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1335

United States Circuit Court
of Appeals 1335
For the Ninth Circuit

J. P. DUKE, as Supervisor of Banks of the
State of Washington, and as Successor in
Office of the Defendant CLAUDE P. HAY,
as State Bank Commissioner of the State of
Washington, FORBES P. HASKELL, JR.,
as special Deputy Supervisor of Banks of
the State of Washington, and SCANDINA-
VIAN AMERICAN BANK OF TACOMA,
a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a
Corporation, FAR WEST CLAY CO. et al.,
Appellees.

No. 3953

Brief of Appellees, Far West Clay Co., et al.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTH-
ERN DIVISION.

R. S. HOLT,
FITCH & ARNTSON,
Attorneys for Appellees.

1115 Fidelity Building,
Tacoma, Washington.

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CLERK

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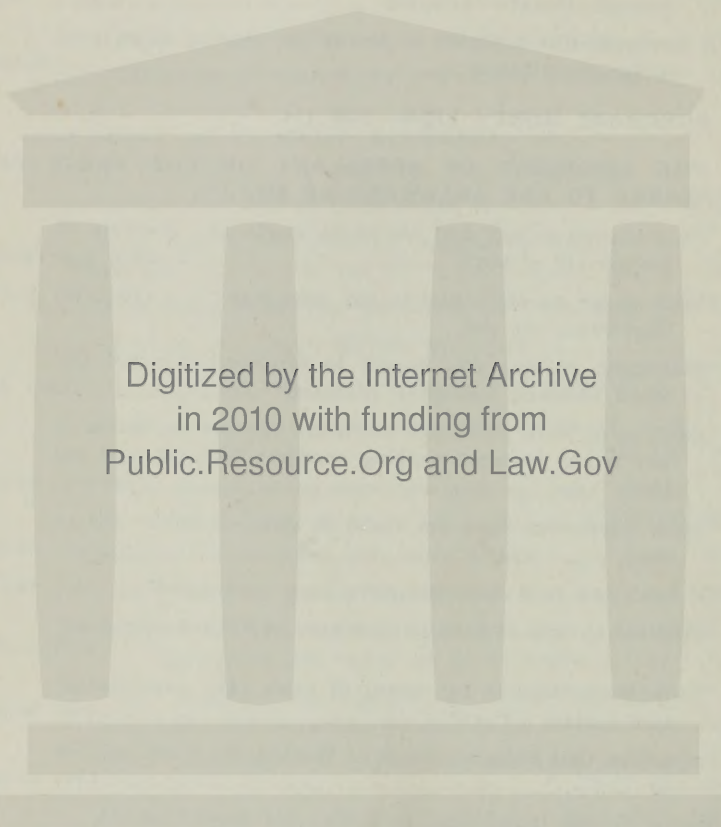
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United States Circuit Court of Appeals

For the Ninth Circuit

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STATEMENT OF THE CASE.

This brief is in behalf of the Far West Clay Com-
pany and Savage-Scofield Company, who claimed
and were allowed mechanics and materialmen's
liens on the building and real estate hereinafter de-

scribed, as well as the other lienors, similarly situated, who join formally therein. This embraces all the parties to the suit except the Scandinavian American Bank, the Scandinavian American Building Company, F. P. Haskell, Receiver of the Scandinavian American Building Company, and John P. Duke, Supervisor of Banking, etc.

This suit was brought to foreclose a lien for builders' materials furnished for use in the construction of a building on lots 10, 11 and 12, in block 1003 in Tacoma, Washington. Most of the other parties thereto, by cross-complaint or counter-claim, sought to foreclose laborers' or materialmen's liens on the same property.

John P. Duke, Supervisor of Banking of the State of Washington, in charge of winding up the business of the Scandinavian American Bank of Tacoma, an insolvent bank, was made a defendant in this suit. He appeared and by a cross-complaint sought to foreclose a mortgage on lots 11 and 12 in block 1003 in Tacoma, Washington, two of the lots mentioned above, for about seventy thousand dollars (\$70,000) and interest which, shortly prior thereto, had been obtained by him by assignment, from the Penn Mutual Life Insurance Company.

He also sought thereby to foreclose a purchase money lien on the said lots, as well as on lot 10 in in the same block, alleging that the bank sold these lots to the Scandinavian American Building Company and that a lien for the unpaid purchase price thereof arose in favor of the bank.

He also sought thereby to foreclose on all of said lots, a certain mortgage which was given by the building company to one Simpson, securing its note for six hundred thousand dollars (\$600,000), which note and mortgage the bank claimed to hold by assignment, as collateral security, for certain alleged indebtedness of the building company to it.

At or about the conclusion of the case Duke practically, but not definitely, withdrew his claim of a purchase money lien and took the position that the amount due for the purchase of the lots, being the principal sum of three hundred and fifty thousand dollars, was in fact embraced in the amount for which the Simpson mortgage was held as collateral, and he asked that this sum be included in the amount of the decree foreclosing the said mortgage.

This is the history of the mortgages and the alleged purchase money lien :

In 1909 the Scandinavian-American Bank bought lots 11 and 12 in block 1003 in the City of Tacoma and occupied the building on them until it was torn down in 1919. The lots were subject to a mortgage for about sixty-five thousand dollars (\$65,000), which amount was deducted from the agreed price of \$280,000 and the balance, \$210,000 or \$215,000, was paid in cash (Transcript 1129). The title was taken to an employee of the bank, who afterwards conveyed the property to the bank, and the bank afterwards conveyed it to one Chilberg, an officer of the bank, who thereupon gave a mortgage

on it for a greater sum and then, paying the old mortgage, conveyed the property back to the bank.

The transaction of the conveyance of the property by the bank to Chilberg and the giving of a mortgage by him and the reconveyance of it to the bank, was thereafter several times repeated, until the seventy-thousand-dollar mortgage in question here was given by Chilberg, followed as usual by a reconveyance of the property to the bank. This mortgage was for one hundred thousand dollars (\$100,000), but by payments made by the bank was reduced to seventy thousand dollars (\$70,000). It will be referred to herein as the seventy-thousand-dollar mortgage.

The mortgages were given by Chilberg, instead of by the bank, so that the debt would not appear as one of its liabilities, but in each instance where the mortgage was increased the bank received the excess and it always paid the interest on the debt and made payments in reduction of it (Transcript 1100-1-2, 1129-30, 1132, 1138-40).

A consideration of the evidence shows conclusively that no matter whether the mortgage did or did not appear as a liability of the bank on the records or in its published reports, so far as this case is concerned, it was the debt of the bank.

In 1919 a scheme was formed, by the bank, for the building of a large office building by it on the three lots, to be the permanent quarters of the bank, and the Scandinavian American Building Company

was formed by the bank, acting through its officers, as the agency through which the scheme was to be carried out. The banking laws of the State of Washington prohibit the investment of more than a small amount of the bank's money in a banking building, hence the effort to indirectly accomplish this result.

Lot 10, known as the "Drury" lot, was then bought and paid for by the bank, the consideration being sixty-five thousand dollars (\$65,000), but it was conveyed by the owner directly to the building company. This lot is not embraced in the seventy-thousand-dollar (\$70,000) mortgage, but it is included in the Simpson mortgage, hereinbefore referred to.

In furtherance of the scheme, and on February 25, 1920, the bank conveyed lots 11 and 12 to the building company for three hundred and fifty thousand dollars (\$350,000), which included the amount it had originally paid in cash for the two lots, the amount of the original mortgage thereon, the price paid for lot 10, the Drury lot, and some items of interest and expense charged against the account. The deed was a warranty deed *with full covenants* (Record, p. 1194). The consideration was a nominal one, but the stamps were \$350 in amount.

At or prior to the time of the conveyance of the lots to the building company by the bank, it was expressly understood and agreed between the parties

that the bank assumed and would pay off the seventy-thousand-dollar mortgage (Transcript 1045, 1046-49).

In the fall or summer of 1920 the manager of the bank went East, carrying with him its check to pay off the seventy-thousand-dollar mortgage which it had agreed to pay, but the time of its payment was extended and it was not paid (Transcript 1045-6).

An understanding was had between the bank and the building company that, in order to raise the money to complete the building, a mortgage for six hundred thousand dollars (\$600,000) should be given by the building company, and that it should be floated in the East, for which some contingent or conditional arrangement had been or was about to be made. This was to be a first mortgage and it was accordingly executed by the building company to one Simpson, securing a note made by him for that amount. This mortgage, of course, could not be negotiated or become a first mortgage until the seventy thousand dollars (\$70,000) was paid off. It will be hereinafter referred to as the "Simpson" mortgage.

Simpson having failed to negotiate this mortgage, the bank president feared that if anything happened to Simpson with the mortgage standing in his name, serious results might follow, and accordingly it was determined by him that Simpson should assign this mortgage to the bank to guard against

such a contingency. An assignment of this mortgage was accordingly taken to the bank for *no other reason or purpose*. Mr. Larson, who obtained the assignment, swore to this (Transcript 1048-51, 1085). It was made in October, 1920, after the lienors had begun to furnish the builders' materials for which they claim liens in this suit.

At some later date when called on to make a showing of its assets, certain officers of the bank stated, or claimed, that it held this mortgage, by virtue of this assignment, as collateral security for the payment of the indebtedness of the building company to it, but when or how or with whom this idea originated is not clearly shown by the evidence. There appears to have been no substantial basis for it.

It was not contended in this suit that the building company consented to or acquiesced in this statement or claim, but it was suggested that the fact that some of the officers of the bank, who assented to or acquiesced in it, were also officers of the building company, was equivalent to its consent. There was, in fact, no indebtedness from the building company to the bank at the time the assignment was taken, or if there was any it was but a small amount. As a matter of fact, one or two officers of the bank testified that Larson, the manager of the bank, said he would obtain the assignment as security for the indebtedness to the bank. This testimony was objected to and the court reserved

his ruling, taking the position that he would consider the testimony if it later appeared that it was material or competent. Mr. Larson was the man who obtained the assignment and he knew why and for what purpose he did it. At that time the scheme of constructing the building was in progress.

If the Simpson mortgage, from which the money to pay for the building was to be derived, had been pledged to the bank, its value for the purpose for which it was given would have been destroyed. Larson's statement must be correct.

As a part of the scheme, it was agreed between the bank and the building company that the latter company would give another mortgage on these lots, to be a *second* mortgage securing bonds for seven hundred and fifty thousand dollars (\$750,000), and that the bank would take these bonds to the amount of three hundred and fifty thousand dollars (\$350,000) in payment for the said lots, and that the balance of the bonds should be sold to procure money needed in the operations, the Scandinavian American Bank of Seattle, Chilberg's bank, agreeing to take part of them. This mortgage was not executed, the inability of Simpson to negotiate his mortgage and other circumstances having eventually caused the collapse of the entire scheme.

At the trial Duke did not rely wholly on the assignment of this mortgage; he contended that in some way, by virtue of some implied understanding or some equity arising from the circumstances,

this mortgage was security for the money paid out by the bank prior to this assignment as well as that subsequently paid out, and that the security attached at the time of the giving of the mortgage, so as to take priority over the liens for materials and labor subsequently expended on the building.

There is no foundation whatever for the claim that the Simpson mortgage was given to secure any present or future advances of the bank to the building company. The evidence shows that at the time it was made no such advances were then contemplated (Transcript 1084-88, 1153-1177). If any were made, the making of them was in violation of an understanding among the bank officers and the Bank Supervisor that the bank would not advance any money for that purpose, and was but the unwarranted act of the managing officer of the bank (Transcript 1088, 1153-77). If he had any definite plan, he relied, for their repayment, not on the Simpson mortgage, but on the money to be derived from the bonds to be issued under the second mortgage, which was to be given after the placing of the Simpson mortgage. If the advances were not contemplated, when the mortgage was given, how can it be said that the mortgage secured them?

Only a very small amount of money had been advanced by the bank prior to the assignment of the Simpson mortgage. Two hundred thousand dollars of the bank's money was placed to the credit of the building company, but this was in payment for

the subscription of Larson to the capital stock of the building company, which he made for such a purpose, and the stock was turned over to the bank and it became the owner thereof (Transcript 1032-3, 1043). The validity of this transaction does not throw any light on the question whether the mortgage was given to secure an existing debt.

During the last stages of the trial of this suit it was claimed that the purchase price of the lots was secured by this mortgage, yet, by the express agreement just referred to, the bank was to be paid for them by bonds issued under the second mortgage, to which we have just referred (Transcript 122-3, 1017, 1106).

In reality, the bank itself was constructing the building, and while it seems almost incredible that a bank with such limited capital and assets would assume a collateral undertaking involving the expenditure of over a mililon dollars in money and would, in blind confidence and recklessness, expend its actual available cash in furtherance of it, while the scheme itself was still in the formative stage, yet this was done, and the evidence does not render it as probable that the bank expected to be paid its money from the proceeds of the Simpson mortgage as that it expected it to be paid from the proceeds of the bonds to be issued under the second mortgage, mentioned above.

The declaration of trust made by Simpson to the building company clearly shows that the proceeds

of the Simpson mortgage were to be paid to the building company, untrammelled by any claim or trust in favor of the bank (Transcript 1011-12). The transaction presents the aspect of one in which the officers of the respective corporations, largely identical in person, did not deem it necessary that there should be any express or written agreement as to the time or the maner in which the expenditures of the bank should be returned to it. The bank officers seemed to think that the bank could do what it pleased with the money in its possession and that in dealing with the building company it was dealing with itself, or with one wholly within its control or under its direction.

Before the commencement of this suit and after the failure of the bank, the Supervisor of Banking, John P. Duke, who will be hereinafter referred to as "Duke", filed a petition in the State Court alleging that the bank held a mortgage for six hundred thousand dollars (\$600,000) on the three lots hereinbefore described, but that there was a first mortgage on two of them for seventy thousand dollars (\$70,000); that payment thereof had been demanded and that if it was not paid the interest would be increased to eight per cent. He asked for an order to pay the latter mortgage and take an assignment of it. The court made an order, *ex parte*, in which it recited that the petition sought for an order "to take up by assignment or otherwise" the mortgage in question and that

it was to the interest of the creditors of the bank that it should be *taken up* "to prevent the foreclosure of the same and thereby incurring a tremendous amount of costs and attorneys' fees", and it directed that the mortgage be taken up "by a ssignment or otherwise" by the Bank Supervisor (Transcript 1217). Duke paid the mortgage and took an assignment of it, and is now seeking to foreclose it in this suit, and in his cross-complaint prayed for an attorney's fee of seven thousand dollars (\$7,000) for the foreclosure of it.

After having thus obtained this mortgage, and being already the holder of the Simpson mortgage by assignment, which was manifestly subordinate to the liens for builders' material, if it was valid at all in the hands of the bank, and the holders of the liens having begun this action to foreclose the same, Duke determined to use this mortgage for the protection of the bank and its interests, and to squeeze out the holders of the liens if possible, and he sought foreclosure of it for this purpose.

At the trial it was contended by us in behalf of the Far West Clay Company, Savage-Scofield & Company and the other lienors that the payment of the seventy-thousand-dollar mortgage by Duke, the Supervisor of Banking, operated as a discharge of it, and that the assignment to him was of no effect, for the following reasons:

1. That the debt secured by the mortgage was in fact the debt of the bank and the bank was under

a legal obligation to pay it, although the debt was in form the debt of Chilberg.

2. That when the lots were sold to the building company by the bank the amount of the mortgage was not deducted from the consideration agreed on, but it was included in it and the bank *expressly assumed and agreed to pay this mortgage*; that the bank, and hence Duke, could not pay the debt and hold the mortgage in violation of its contract, against the intervening rights and equities of others.

3. That the deed from the bank to the building company, conveying the lots, was a warranty deed with full covenants; that the bank, and hence Duke, could not purchase and hold the mortgage against the mortgaged premises in violation of its warranty against intervening rights and equities.

4. That in this suit Duke was attempting to recover and enforce a lien for the full purchase price of the lots, which included the amount of this mortgage. That he was thus affirming and seeking to enforce the contract in part, while he was repudiating it in other respects by seeking to enforce the mortgage which the bank had agreed to pay and against which it had covenanted.

The court adopted the view that the relation of the Supervisor of Banking to the bank and the other parties was like that of a receiver or similar trustee and that, inasmuch as a payment by the bank in this manner would have operated as a discharge

of the mortgage, the same legal consequences followed when it was paid by Duke. The fact that in his cross-complaint Duke sought the foreclosure of a lien for the purchase price of the lots, and that in this price was included the amount of the mortgage which the bank was bound to pay and which it assumed to pay, and the further fact that even at the conclusion of the trial Duke claimed that the full amount of the purchase price was secured by the Simpson mortgage and asked for a decree therefor, influenced the court in his decision. Foreclosure of the mortgage was denied, as well as the foreclosure of the purchase money lien.

The decision of the court below is reported (Sec. 281 F. 166).

As to the Simpson mortgage, it was contended by us and all the lienors that this mortgage could not be foreclosed by Duke at all and that, in any event, it was subsequent to the liens for labor and materials, for the following reasons:

1. That Simpson held the mortgage as trustee for the building company, for the purposes indicated by his declaration of trust to that effect (Transcript 1010). Therefore he had no power, at the mere request of the bank, to assign it as collateral security. That all the facts were known to the bank and its officers and it was a mere volunteer .

2. That, under this assignment, the bank held the mortgage as trustee for the building company with no better or other title than was the title of Simpson, its assignor.

3. That the mortgage, not having been sold and negotiated and no money having been paid for it, its purpose failed and it was but a lifeless contract, importing no liability to anyone. An assignment of it for some other purpose would not be valid.

4. That it did not appear from the evidence that the building company knew of or consented to this assignment or the alleged purpose, by reason of which the right to enforce it is now claimed.

5. That if the assignment was in fact made as security, the debt was a pre-existing one and, no consideration passing, it and the mortgage were void under the constitution of the State of Washington, which prohibits the issuance of bonds, notes, etc., by a corporation, except for money or property actually received, which has been construed to mean a present consideration.

6. That if the mortgage ever became security to the bank in any way, it was only by virtue of the assignment, and consequently money expended by the bank prior to its execution would not be secured by it or take priority over liens initiated prior to the assignment.

7. That as to advances made by the bank after the assignment of the mortgage, the liens would take priority over it in those cases where the lienors began to furnish the labor and materials prior to the making of these advances.

8. That the officers of the bank had falsely represented to the lienors and had caused it to be gen-

erally understood that the money to pay for the building had been provided or arranged for, and the bank was therefore estopped from subsequently taking as security one of the mortgages which it now appears was given for the purpose of providing this money, and then holding it as collateral security for its advances against the rights of these lienors. That it would be inequitable to permit the bank to do this and it is therefore estopped from so doing.

This is the view of the court below as shown in the opinion, 281 Fed. 181:

The foreclosure of this mortgage was denied because the assignment of it was as collateral security for a pre-existing debt.

The court also held that it would be inequitable to permit the bank to foreclose this mortgage against the lienors, because the money to be derived therefrom was to have been applied to the payment of the expenses of the building operations, the building company being the mere agent or creature of the bank.

ARGUMENT.

\$70,000 MORTGAGE.

This suit was begun on January 18, 1921.

The \$70,000 mortgage was assigned to Duke on February 25, 1921.

The order authorizing the purchase of it was made on February 23, 1921 (Transcript, page 1217).

At this time the whole matter was in this situation:

The building company was indebted to the bank in quite a large sum of money. It owed the bank for the purchase price of the three lots, which, the amount of this mortgage being included, amounted to \$350,000. The bank had no security for the purchase price of the lots, it having been agreed that they were to be paid for by the issuance of bonds secured by the \$750,000 mortgage that had never been executed (Transcript 122-3, 1017, 1106).

The bank was the holder, by assignment, of the Simpson mortgage, which it claimed to hold as security for advances to the building company, but which assignment and mortgage were of doubtful validity and effect. Several hundred thousand dollars had actually been expended in the construction of the building by the building company.

The liens of the lienors which have been asserted in this case had already attached and in most cases the notices of liens had been filed. Duke was therefore confronted with this situation:

The time of the extension of the \$70,000 mortgage, made to Larson when he took a check to the holder to pay it, had expired and payment was demanded.

The bank was in a position where it could not rescind the contract because the parties could not be placed *in statu quo*.

There is no evidence of any facts which would have justified a rescission because, as clearly ap-

pears, there was never any demand for the execution of the \$750,000 mortgage, nor would it have been feasible to carry out that part of the scheme until the Simpson mortgage had first been floated. It appears that the execution of the \$750,000 mortgage, and issuance of the bonds to pay for the lots and to enable the bank to recoup its advances, had been lost sight of by the parties, and there was no breach of the contract to execute the mortgage by the building company. Therefore we say that the Bank Supervisor, for himself or the bank, could not have rescinded the contract for the two reasons indicated.

He could not stand by and permit the \$70,000 mortgage to be foreclosed because the bank had warranted the title to the real estate against it, and if, by reason of its foreclosure the building company lost the property, it would have a claim against the bank for damages in a very large sum. It was therefore necessary, in the exercise of common, ordinary business sagacity, for Duke to eliminate this mortgage in some way.

Inasmuch as the bank had assumed the payment of it in consideration of the promise of the building company to pay \$350,000 for the lots, it was clearly the duty of Duke, if he intended to claim the purchase price of the lots against the building company or to claim under the \$600,000 mortgage which was put on the lots after they had been conveyed by the bank to it, to pay and discharge this mortgage.

The order of the court, which was wholly *ex parte*, authorizing him to do so, clearly indicates that, at the time the order was obtained, Duke expected to pay the mortgage or discharge or take an assignment of it for the protection of the estate, and not for the purpose of speculating on the rights of those who had furnished builders' materials, based on the ownership of the property by the building company, free of all incumbrances.

Duke was not a party to the original complaint and he bought the mortgage before it had been filed.

After the supplemental complaint had been filed and the situation had cleared, it is apparent that Duke realized he had no security for the purchase price of the lots and that the assignment of the Simpson mortgage was of doubtful validity. He thereupon determined to assert the \$70,000 mortgage adversely to the rights and equities of all the other parties, against the property, and in this manner to obtain the advantage of a decree for the amount of the mortgage, prior to their liens. The discussion in a more specific way of his right to do this will be presented later in this brief.

At this time we take the position that the order of court authorizing the payment or purchase of the mortgage, taken in connection with the other circumstances which we have set forth, contemplated that the mortgage should be paid to protect the estate, and it appears clear that Duke was acting in violation of the order of the court and in violation

of his duty when he attempted, in this action, to assert the \$70,000 mortgage as a prior lien on the two lots covered by it, instead of treating it as paid. Under the circumstances he cannot be heard or permitted to say that, when he took the assignment of this mortgage, he took it for any other than a rightful or lawful purpose, which was to discharge it in accordance with the undertaking of the bank to do so.

In the case of *Sisk v. Rapuano*, 11 A. L. R. 1291 (S. C.), 108 Atl. 858, a somewhat similar situation was presented, except that the trustee in bankruptcy, after taking an assignment of a mortgage, as to which there was a warranty in the deed, assigned it to a third person. The action was brought by the assignee to collect the debt. The court said:

“And the court was fully justified in treating the alleged purchase of the note as a futile attempt to keep the mortgage alive as against the mortgagor and as against the lands in the hands of the mortgagor’s grantees.”

It also said:

“It is difficult to see why any responsible authority should permit a trustee in bankruptcy to buy an overdue demand note of the bankrupt secured by a mortgage on real estate, the endorsement on the note being ‘without recourse and without warranty express or implied’, and the surrounding circumstances making it at least probable that the trustee was buying a lawsuit.

“The only reasonable explanation of the affair is that which the court adopted, namely: That the trustees, who might either elect to carry out or not the contracts of the bankrupt, according to whether they seem profitable or otherwise, elected to carry out the contract expressed by the policy, in order to obtain the balance of the insurance money for the estate. Having adopted and elected to carry out the contract expressed in the policy, he is bound to take it as he found it, including the open mortgage clause.”

Applying this doctrine to the case at bar, we say that the act of Duke in paying and taking an assignment of this mortgage must be treated as an act, directly in the discharge of his duty, to preserve and protect the estate in his custody by preventing a foreclosure of the mortgage with the resulting loss, to both the building company and the bank, arising from the breach of the warranty.

The court below adopted the same view of the question in this case and said:

“The deed from the bank to the building company being a warranty deed, if the lien claimants were not in privity with the owner, so that they could maintain suit against the bank upon the warranty, the building company and its receiver could maintain such a suit, and anything realized therefrom could be subjected to judgments recovered by the lien claimants. The bank’s receiver, in taking up this mortgage, was merely seeking to prevent the

further increase of claims against the trust estate in his hands, which, if suffered, would result in the dilution of the assets, and could not but prejudice the depositors and other creditors of the bank. Under these circumstances, to hold the bank receiver's action in taking up the underlying mortgage a purchase, whereby he escaped liability upon the warranty and also secured a position of advantage where he could defeat the lien claimants, not only has no equity in it, but would be highly inequitable."

McClintic-Marshall Company v. Scandinavian American Building Company, 281 Fed. 166, 170.

What we say in this connection, with reference to the breach of the warranty, applies as well to the breach of the agreement and contract of the bank to pay and discharge this mortgage. We say breach because, if Duke is permitted to enforce this mortgage, it constitutes a breach of this contract.

We may add that in this suit Duke is attempting not only to foreclose this mortgage, but is seeking to recover the full contract price of the lots, \$350,000, which includes the mortgage, either as a purchase money lien or under the Simpson mortgage. Our equities entitle us to invoke the rule of equity against it.

The foregoing statement indicates clearly to the court the condition of the estate of the insolvent bank, its claims to the \$70,000 mortgage, the \$350,000 lien, and the Simpson mortgage; and it clearly lays before the court the rights and equities of

others arising from the valid and subsisting contracts made by the bank in assuming the payment of the \$70,000 mortgage and in warranting the title to the real estate, and places the court in a position to properly consider, if necessary, the other questions concerning the right to foreclose the \$70,000 mortgage, which we will now present.

IN ANSWER:

In this connection we desire to call the attention of the court to the discussion of this question found in appellant's brief, beginning on page 65, under the heading, "*There was no intention of the Bank Commissioner to pay the mortgage and discharge the lien thereof.*"

How can this be contended in the face of the fact that Duke then expected to enforce his purchase money lien and is now doing so? The assumption of the mortgage was part of the agreement for the purchase of the lots, and the amount thereof was included in the price. Can he be heard to say that his purpose was to hold both the mortgage and the purchase money lien?

In this discussion, while counsel for appellants frankly admit that the doctrine of merger has no application to the case at bar, yet for some reason they enter into an argument on the doctrine. They point out that one of the cardinal rules for the application of the doctrine of merger is that a merger will not be decreed against the intention of the

parties, and they cite a long list of cases to sustain this proposition. We do not dispute this proposition as a general rule, but we submit that there is a qualification of this doctrine which may be expressed in these words:

Whenever the rights of others are involved and justice and equity require it a merger will be decreed, even though it was the intention of the party acquiring the interest or estate subject to merger, that a merger should not take place.

It is idle, however, to talk here about the doctrine of merger applicable to conditions where there are two estates, held by the same person at the same time, which is the condition to which this doctrine is applied. The doctrine that we invoke in this case is not the doctrine of merger; it is a rule of equity or law, as you please to call it, which is applicable to the conditions existing here. It has a certain similarity to the doctrine of merger, but this similarity extends no further than the fact that they are both rules of equity and are established and applied for the purpose of enforcing justice and right.

There is a rule, however, relating to the doctrine of merger, to which — unconsciously, perhaps, — counsel for appellant has called the attention of the court, and this rule should be conclusive as to all the arguments adduced by counsel on this subject. It is found on page 76 of the brief. Speaking there of the question whether a legal obligation

on the part of the purchaser of the encumbrances to pay the same, would prevent him from holding the mortgage as a separate obligation after he had done so, the court said:

“When no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties and their respective interests, and that such will have a strong bearing upon the question of such intent.”

Counsel for appellant prefaces this quotation with the remark that “*the bank was under no obligation to pay this mortgage*”. This statement is found on pages 76, 82 and 83 of appellants’ brief. It is incorrect.

We desire to call the attention of the court to the fact that, under the evidence in this case, it was conclusively and overwhelmingly established, without contradiction, that the bank assumed and agreed to pay this mortgage as part of the contract by which the building company bought the lots, and that, in addition to this fact, the bank warranted the title to the property against all encumbrances, and this of itself imposed on it the obligation to discharge this mortgage, as we will show by references and by the authorities almost immediately following in this brief. The following may be stated to be the rule on this question, as applied to a state of facts calling for its application:

While it is true that the intention of the party will ordinarily control in determining the question

whether there is a merger of the two estates, yet where one of them consists of a mortgage on the other, and the party purchasing and taking an assignment of it is under a legal obligation to pay and discharge it, the question of intent becomes immaterial and, upon payment and taking the assignment of the mortgage, it becomes extinguished.

This is the general rule that may be deduced from the cases cited by appellant, but it is especially laid down in the following cases:

Strong v. Converse, 8 Allen 557, (S. C.), 85

Am. Dec. 132;

Brown v. Lapham, 3 Cush. 554;

Jones v. LaMar, 34 Fed. 454.

In the last case it is said:

“It is insisted that he has the same right to recover on this mortgage that the Bank of the Republic would have had. The court does not so understand the law. When a mortgage debt is paid by one who is bound to pay it, an assignment of it to him upon payment operates as a discharge, and he will not be allowed to hold it as a subsisting encumbrance, as the payment was in pursuance of his agreement and duty and may be regarded as being made with mortgagors’ money.”

This quotation is from page 468 of the reported case, where many cases are cited to sustain the text. This case is too long for us to analyze or discuss, but we invite the attention of the court to it, because

the facts of the case make it decidedly applicable to the case at bar.

It was not questioned in the court below, we believe, that the bank assumed and agreed to pay the \$70,000 mortgage. The testimony on this subject, as found in the record, is shown on pages 1045-6 and 1049.

Counsel for appellant, not content with the testimony shown by the record, undertakes to quote from the *transcript of the testimony*, which is not before the court, and in doing so he selects certain portions of it which do not give a fair presentation of the question. We think it is highly improper for counsel to quote this matter, which is not in the record, but we do not know how to meet it except by quoting from the transcript of the testimony, that part which makes clear the truth of our statement on this subject. We quote from the examination of Mr. Larson (Transcript of testimony, page 557) :

“DIRECT EXAMINATION.

BY MR. HOLT:

Q. Mr. Larson, calling your attention to the Chilberg mortgage, the Penn Mutual mortgage, about which Mr. Langhorne examined you, the one for which you say that you took the check for the purpose of paying, in the discussion or in the transaction of the sale of the property, lots 11 and 12, by the bank to the building company, who was to pay the Chilberg or Penn Mutual mortgage by virtue of that agreement?

A. The bank was to pay the mortgage.

Q. Then, as I understand it, the building company was to pay \$350,000 on the property and the bank was to pay the mortgage that was on it and release it therefrom?

A. Absolutely.

Q. Was that the reason, to relieve that property of the mortgage, that you took the draft to the East?

A. It was due and called, and I told you yesterday, they had only extended it as a personal favor to me.

MR. HOLT: That is all."

What Mr. Larson really meant when he testified in accordance with the quotation found on page 83 of appellant's brief was that the bank expected, when it received from the \$600,000 mortgage payment of the amount due to it, from this amount it would pay and discharge the \$70,000 mortgage because, of course, it was a mere question with the bank whether the money would be taken out of the proceeds of the Simpson mortgage, when part was paid to it, and the mortgage paid with it, and the building company credited on the books of the bank with this amount, or whether the bank would pay it out of its own funds in the first instance. The testimony of Mr. Larson, shown by the transcript of the testimony on pages 545-6, immediately following that quoted by counsel for appellant, indicates this:

A. "I told Mr. Johnson, the president, and Mr. Steble, assistant to the president,—

Q. Whom?

A. And Mr. Homer, the treasurer of the Penn Mutual Life Insurance Company, that we needed the money until we could get the Metropolitan money and he told me to take the check back and send it back to Tacoma, and I very promptly did, and Mr. Langhorne knows all about these circumstances.

Q. In talking with Mr. E. E. Davis and in talking with Mr. Drury on these matters, it was clearly understood that the \$600,000 mortgage would take care of this \$70,000 mortgage?

A. Either that or the bank would have to pay it. It was due and called and they simply extended it to me as a personal favor to me more than anything else.

Q. It was the bank's obligation so far as you know?

A. I have so understood it. I did make other payments on that mortgage. The bank got the money on that original mortgage. I satisfied myself of that."

The fact that the bank conveyed the land by warranty deed, intending to pay the mortgage, is strong evidence of its assumption by it. The Simpson mortgage could not be negotiated until it was paid.

We do not desire to spend any further time in reviewing or discussing the authorities presented by appellant on the doctrine of a merger, because we

are satisfied that, if the principles involved in this doctrine have any application to the facts of this case, they sustain entirely the rule for which we are contending and the cases will show it.

EQUITIES OF LEINORS AND BUILDING COMPANY.

EQUITIES OF BANK SUPERVISOR.

Throughout this brief will be frequent references to the "equities of others" and to the "equities of lienors" of the "building company." It is well to define at this point what these equities, in relation to the \$70,000 mortgage, are.

At the time the mortgage was assigned, the title to the real estate embraced in it was in the building company, supported by a full warranty deed from the bank and also by the promise of the bank to pay the mortgage. The deed was recorded at or about the time of its execution, which was almost a year prior to the taking of the assignment of the mortgage.

The lienors at that time had valid and subsisting liens on the property, which conferred on them certain legal rights therein. These rights attached to all the right, title and interest of the building company thereto, both legal and equitable, as the title stood at the time their liens accrued by the commencement of the furnishing of the materials or labor.

Each of them could contest the validity of the other liens. They could contest the validity of any mortgage on the property, or the right of the holder thereof to enforce the same. They could contest the validity of any other claims asserted against the property.

In support of these legal rights, or by reason thereof, certain equitable rights arose from the circumstances and existed in their favor.

By reason of the assumption of the mortgage by the bank at the time of the sale to the building company, it could not acquire title thereto and assert it against the property, adversely to them. Equity prohibits it from so doing.

By reason of the deed, with a warranty against encumbrances, the bank could not acquire title to the mortgage and enforce it against the property, adversely to their liens. Equity prohibits it.

Even if the failure of the building company to pay the purchase price of the lots would have justified the bank in rescinding the entire contract and thereafter purchasing the mortgage and enforcing it against the building, equity would estop it from doing so against the lienors, on account of the fact that during the time the real estate was the property of the building company under the *warranty deed*, the liens attached. The lienors had, therefore, the right to enforce their liens against it, as the title stood, and equity would estop the bank from buying and enforcing the mortgage against it and would

estop it from rescinding the contract so as to acquire such a right against them. In fact the contract could not have been rescinded under the circumstances, and there has never been any effort to do so. It is being affirmed by an action to foreclose a purchase money lien under the contract.

The lienors had the equitable right to enforce their liens, free from any right of the bank to assert the mortgage it had promised to pay, and against which it had warranted the title.

The lienors also had the equitable right to say to the bank, "You cannot enforce the claim for the purchase price of the lots, which includes the mortgage, and at the same time acquire and enforce the mortgage."

The lienors would have the equitable right to have the mortgage treated as discharged in the hands of the bank, under such circumstances, regardless of the intent or purpose of the bank in acquiring it.

Our position is that these equities are of such a nature that they were binding on Duke when he succeeded the bank. They followed the estate into his hands and he could not relieve it from them, nor could he violate them in administering it.

EQUITIES OF BANK SUPERVISOR.

Throughout the progress of appellant's brief it is constantly contended that some equity in favor of the Bank Supervisor or those whom he represents, superior to the equities of the lienors and the build-

ing company, arises in this case. We dispute this proposition *in toto*. We contend that no equity arises in favor of the Bank Supervisor either from an ethical, legal or equitable standpoint.

The word "equity" as ordinarily used must not be confounded with the "equity" which is recognized by the courts and which calls for their aid and protection. One may have an abstract idea of what would be equitable and just, but it does not follow that this would constitute an equity to be regarded and protected by the courts.

The bank entered into the contract with the building company. It was a foolish contract, but it served as a means by which the lienors in this case were led into the transaction of furnishing the supplies and labor to assist in carrying it out.

The \$70,000 mortgage was on the premises and constituted a first lien thereon.

According to the scheme which was adopted and approved by both the building company and the bank a mortgage for \$600,000 was given to secure the money to construct the building. This mortgage was given in the spring of 1920, and it was contemplated and expected that it would be immediately negotiated. It follows necessarily that this expectation, as all parties must have known, could not be realized without a previous satisfaction of the \$70,000 mortgage.

It was also agreed between the building company and the bank that the building company would pay

\$350,000 for the property and that the bank would pay off and discharge the \$70,000 mortgage. This agreement seems to have been made in February, 1920, and contemplated that within four months the building company should execute and deliver bonds secured by a second mortgage. In furtherance of the scheme, the bank conveyed the lots covered by the mortgage to the building company by warranty deed, and the deed was put on record. This warranty deed, of itself, was sufficient to advise the lienors and the world at large that the title to the property was free of encumbrances, and necessarily implied that the bank would make good its warranty by discharging the mortgage. The testimony shows conclusively that thereupon the bank and the building company made representations to various lienors and caused it to be understood and induced them to make contracts with the building company and furnish labor and builders' materials.

Now, it is perfectly clear that all parties would have expected that the first step in the execution of the scheme was the release and discharge of the \$70,000 mortgage so that the Simpson mortgage might be negotiated, and that after it was negotiated the next step would be the issuance and negotiation of the second or \$750,000 mortgage from which, when issued, the bank was to receive payment for the lots in the form of bonds for \$350,000. We will presume, for the purpose of this argument, that this was a legitimate and business-like transaction.

Later on it developed that the Simpson mortgage could not be negotiated and the \$70,000 mortgage became due. Thereupon the president of the bank went East, taking with him a check for the purpose of paying this mortgage, which, of course, was an obstacle to the negotiation of the Simpson mortgage if it was not discharged. An extension of this mortgage was thereupon obtained by the president of the bank.

The plan thereupon became somewhat disorganized by reason of inability to obtain money and, so far as the record in this case shows, it never occurred to anyone that the mortgage for \$750,000 should be executed and the bonds issued thereunder in payment of the lots, because the groundwork for this course had not been laid either by the payment of the \$70,000 mortgage or the floating of the Simpson mortgage.

It will not do for counsel for appellant to say that the building company was in default with reference to the payment for the lots. The whole scheme became arrested so far as these matters are concerned, and it probably did not occur to anyone that it was even desirable to execute this second mortgage until the \$70,000 mortgage had been paid off and the other mortgage had been floated, for if it was not possible to float the Simpson mortgage it would have been absurd to attempt to float the \$750,000 mortgage bonds.

There is not a suggestion to be found in the entire record pointing to the fact that anyone ever

even suggested the execution of this \$750,000 mortgage so as to pay for the lots by bonds issued under it. As a matter of fact, the bank had not discharged its obligation to pay off the \$70,000 mortgage, and the transaction shows that by mutual consent the matter was permitted to rest as it was.

Later on, in September, the bank obtained an assignment of the Simpson mortgage and no effort appears to have been thereafter made to negotiate it.

Under these circumstances it is idle to charge that the building company was in default in respect to the payment for the lots by the issuance of bonds under the \$750,000 mortgage. If it was in default in this respect, the bank was also in default in not having discharged the \$70,000 mortgage.

It will be observed that the officers of the building company and the officers of the bank were practically identical. It would be a strange thing if they were permitted to put the building company in default under such circumstances so as to affect the equities of the intervening lienors.

The bank failed, and thereupon the problem was presented to Duke whether he would pay off this \$70,000 mortgage in pursuance of the undertaking of the bank to do so and in the protection of the bank from the consequences of the breach of its warranty, and in order to protect the estate in its hands from a foreclosure of the mortgage and the consequences which would have followed.

He paid this mortgage from the funds belonging to the estate, which came into his hands for ad-

ministration. It is claimed by appellant that he did not intend to pay it but that he intended to take an assignment of it, keep it alive, and assert it in a hostile manner against the estate conveyed by the bank and in violation of the promise of the bank to pay and discharge it.

When confronted by the legal proposition that such a payment, under the existing circumstances, operated to discharge the mortgage regardless of his intention, he pleads that an equity arose in favor of the estate which he could assert and that it would be a hardship to apply the money of the estate to the satisfaction of this mortgage. Where is the equity to which he alludes? Does it arise from the fact that he made a mistake of law in purchasing this mortgage? Does it arise from the fact that the transaction resulted in a manner different from that which he contemplated?

It is certainly not inequitable to say that the representative of the bank, having paid the mortgage, cannot now claim the benefit of it and assert it against the equities of those who were induced by the bank to make advances to the building company. It is certainly not inequitable for the Bank Supervisor to carry out the contract of the bank for the payment of this mortgage, if he contemplates recovering from the bank the purchase price of the lots. No one can point out how any equity arose in favor of the depositors or creditors, distinct and independent of the equities arising in favor of the Supervisor of Banking.

He stands before this court seeking to foreclose a purchase money lien for \$350,000 which he claims arose from the contract of the building company to pay this sum for the property, and we know that this was in consideration of the payment by the bank of the mortgage in question. This lien for the purchase money is being enforced for the benefit of the estate, the depositors and the creditors, and Duke is the agency through which it is being done.

Under such circumstances, to invoke the aid of the court to sustain the right of Duke to put through this grotesque conception seems more like a screaming farce than a serious legal contention. We fail to find the equities referred to by counsel for appellant. On page 33 of appellants' brief is found the statement that there was nothing due to any of the material-men except McClintic-Marshall Co. on October 9, when the assignment was made of the Simpson mortgage. This is not correct. For instance, there was then due or unpaid to the Far West Clay Co. the sume of \$976.16 (Transcript 354).

**CAN THE SUPERVISOR OF BANKING EN-
FORCE THE MORTGAGE FOR \$70,000,
WHICH WAS PAID AND THEN ASSIGNED
TO HIM?**

In presenting this question it is necessary to discuss it in its two branches separately: (1) Could the bank have paid this mortgage and taken an assignment of it so as to enforce it against the

property? (2) Did the Supervisor of Banking have the right to pay this mortgage and take an assignment of it and enforce it in this suit when the bank could not have done so? The latter question will be presented later in this brief.

The question based on the fact that the debt secured by this mortgage was the debt of the bank, and the other fact that the bank assumed and agreed to pay it in consideration of the promise of the building company to pay \$350,000 for the three lots, depend on practically the same rule of law, and they will therefore be discussed together.

The debt secured by the \$70,000 mortgage is a continuation of a debt which was secured by a mortgage on lots 11 and 12 when they were purchased by the bank, and the amount of the mortgage was at that time deducted from the purchase price. (Transcript 1129-30).

As we have pointed out, in order to escape the necessity of listing this debt as one of its liabilities, the bank, while paying interest on it and while making additional loans increasing or diminishing it, caused the notes and mortgages to be made by Chilberg, and even went so far as to have a release of it by the holder of the mortgage so that it would not in fact be one of its legal obligations. This was done, apparently, in order to avoid the demand of the banking department of the State of Washington that a true statement of its liabilities should be given; it was finally compelled, we believe, to

publish this debt as a charge against the property of the bank in one of its statements in evidence in this case (Transcript 1100, 1101). It is perfectly clear that while this subterfuge was not adopted to escape the particular consequences connected with the transactions involved in this suit, yet it was none the less a subterfuge; and while it might have relieved the bank from any liability to the holder of the mortgage, yet that is a matter which concerns us very little in this case. We are proceeding against the property, and it would not relieve the property of this charge.

As a matter of fact, Chilberg, the maker of the note and mortgage in question, was not made a party to this suit to foreclose the mortgage, and it is very clear that if the Bank Supervisor had attempted to take a judgment against him for the mortgage debt he would have claimed that it was not his debt but that it was the debt of the bank. If the bank, prior to its failure, had taken an assignment of this mortgage, it is very clear that Chilberg could have defended an action to enforce a personal liability against him for it, on the ground that the debt was the debt of the bank and that it was merely put in the form shown by the record for the convenience of the bank and to relieve it of the obligation of listing this debt as one of its liabilities.

It makes little difference, however, whether the mortgage was in fact the debt of the bank or wheth-

er it merely assumed and agreed to pay it. The rule is the same in both cases:

“Where payment of a mortgage is made by one who is under a legal duty to pay it, the mortgage will be extinguished and discharged, so far as concerns third persons, although an assignment in form may be taken.”

20 Am. & Eng. Encyc. (2nd Ed.) 1060; see also 2nd 1027 and 3- b. c.;

Hussey v. Hill, 58 Am. S. R. 789;

27 Cyc. 1332-40, 1435-6-7;

Lydon v. Campbell, 84 N. E. 305;

Lydon v. Campbell, 91 N. E. 151-4;

Clay v. Banks, 71 Ga. 363;

Carrothers v. Stuart, 87 Ind. 424;

Burnham v. Dorr, 72 Md. 198;

Carlton v. Jackson, 121 Mass. 592;

Wadsworth v. Williams, 100 Mass. 126;

Brosseau v. Lowy, 70 N. E. 901;

Butler v. Seward, 10 Allen 466;

Spirk v. Whitten, 31 N. E. 87;

Burch v. Grove, 12 N. E. 514;

Clay v. Morgan, 16 N. E. 790;

Birke v. Abbott, 103 Ind. 8;

Bunch v. Graves, 111 Ind. 353;

Caley v. Morgan, 114 Ind. 357;

Kingsley v. Purdom, 53 Kas. 56, s. c. 35 Pac. Rep. 811;

Burnham v. Dorr, 72 Me. 198;

Danforth v. Briggs, 89 Me. 316, s. c. 36 Atl. 452;

Forthman v. Deters, 69 N. E. 97;

Kneeland v. Moore, 138 Mass. 198;

Jager v. Vollinger, 174 Mass. 521, s. c. 55 N. E. 458;

Frey v. Vanderhoof, 15 Wis. 397.

In the case of *Kingsley v. Purdon*, *supra*, Kingsley sold property on which he had given a mortgage, he having signed the note with his mother, the title to the property being in her name; subsequently a judgment was rendered against the vendee of the property. Kingsley paid off the mortgage but took an assignment of the note and mortgage to a third person. He attempted to obtain priority by foreclosure through this third person over the judgment in this way for the mortgage, claiming that he was only a surety. The court held that he was not a surety and the payment of his own note operated as a satisfaction of it.

In the case of *Burnham v. Dorr*, *supra*, it was held that one having assumed the payment of a mortgage cannot afterwards pay it and keep it alive against the property. There is nothing to show whether the purchaser of the mortgage was still the owner of the property at the time of the purchase, but the circumstances indicate that he was not.

In this case it was also held that notwithstanding the property had been conveyed by warranty deed, yet it was competent to show by parol that the vendee assumed and agreed to pay the mortgage.

In the case of *Danforth v. Briggs, supra*, the title to the real estate was in the wife, the notes were signed by both husband and wife, but the mortgage was given by the wife. The husband paid the mortgage debt and took an assignment to himself. The wife subsequently obtained a release of the mortgage. He claimed he was a surety for his wife. It was held by the court that the evidence showed that the debt was his and the payment by him was a discharge.

In the case of *Kneeland v. Moore, supra*, it was held that payment by one whose duty it is to pay discharges the mortgage.

This was an attempt to shut out the holder of an easement by the person who assumed to pay the mortgage. In this case the court held that it was not a question of merger, but that it was a question of the rights of the parties arising from the circumstances and of their legal effect.

In the case of *Frey v. Vanderhoof, supra*, a man bargained for certain land and agreed to pay a mortgage that was then an encumbrance on it. He caused the title to be put in the name of his son and the son gave a mortgage for the balance due on the purchase price. The vendor foreclosed this mortgage and bought in the property. The man who had bargained for the land and had assumed to pay the mortgage on it then paid this mortgage and took an assignment of it to himself and undertook to assert it against the purchaser and under

the second mortgage. It was held that he could not do so; that the payment by him of the mortgage which he had assumed to pay amounted to an extinguishment of it. The deed by the original vendor contained a covenant against encumbrances, but it is shown by parol that this was a mistake, that as a matter of fact it was the understanding that the vendee should assume the mortgage. It was held that this evidence was permissible.

In the case of *Frothman v. Deters*, *supra*, it was held that equity did not prevent a merger as against the interest of the third parties, and in this case the question as to what amounts to an assumption of the debt is discussed and should be read.

Lyndon v. Campbell, *supra*, is a case where it is held that the assumption of the mortgage made it the debt of the person assuming it.

In the case of *Tefft v. Munson*, 57 N. Y. 97, a mortgage was given on land to which the mortgagor had not title. He afterwards acquired a title. It is held that it inured to the benefit of the mortgagee.

In the case of *Sisk v. Rapuano*, 11 A. L. R. 1291, s. c. 108 Atl. 858, there was an insurance policy with a mortgage clause protecting the interests of the mortgagee. There was a fire. After the fire, the owner sold the property and agreed to pay off the mortgage. He became insolvent. His trustee took possession of his estate, which consisted only of the proceeds of the insurance policy. He took

the money, paid part of it to the holder of the mortgage and took an assignment of the mortgage to him. He subsequently sold this mortgage for a nominal consideration to Sisk, the plaintiff in the action, who brought an action to foreclose it against the owner of the property.

Without discussing, at this point, the question as to the right of the trustee to deal with the mortgage as an independent purchaser thereof, the court disposed of the right which the insolvent himself would have had by saying:

“In this case, however, Grillo (the mortgagor and vendor) warranted the land free from all encumbrances and undertook that the mortgage debt should be paid out of the insurance, and it is apparent that Grillo, at least, was not equitably entitled to subrogation.”

This case discusses also the question as to the right of the trustee to purchase independently of the right of his principal, and we will refer to it in this brief on this question in the proper place.

Where one assumes the payment of a debt he becomes the principal debtor.

Beitel v. Dobbin, 44 S. W. 299;

Birke v. Abbott, 103 Ind. 1, s. c. 53 Am. R. 474;

Forthman v. Deters, 69 N. E. 97.

The doctrine laid down in the foregoing cases, for which we contend, is sustained by all of the decisions which have come under our notice.

wards pays off or takes an assignment of the mortgage against the premises, the same becomes extinguished. He cannot keep it alive as a subsisting lien, for to do so would be a direct violation of his covenant, which rule is supported by ample authorities there cited."

We believe that it is not necessary for us to cite additional cases to the court supporting this rule. In our investigation of the authorities, we have not found a case affirming a contrary doctrine.

IN ANSWER:

On page 83 of appellant's brief, he takes the position that the bank could have purchased and enforced the \$70,000 mortgage because "it was not liable to pay the same", and because the building company had "breached its contract to pay for the lots".

We have shown in this brief, by reference to the testimony both in the transcript and the record, that the bank not only warranted the title to the lots, but expressly assumed the mortgage, and counsel's statement to the contrary is wholly unwarranted. The Penn. Mutual Co. at one time released the bank from liability to it on the mortgage, but that did not affect its agreement with the building company to pay it. We have pointed out in the preceding pages that the building company did not breach its contract to pay for the lots by the issuance of the bonds under the mortgage; that the

bank did not pay the mortgage and the building company did not issue the bonds because the scheme became paralyzed and everything "went to pot".

In view of the authorities we have cited in this brief, we think no further argument on this proposition is necessary, except to call attention to the fact that in one part of it counsel still insists that the Bank Supervisor "does not stand in the shoes of the bank nor does he represent either the bank or its stockholders". By a strange coincidence, this is just the opposite of the language found in so many of the cases to which we have referred the court, and particularly in the case of *Peoples State Bank of Lakota vs. Frances et al.*, 79 N. W. 853, in which, speaking of the receiver of a national bank, the court said:

"The Government places him in charge of one of its financial agencies for the purpose of closing it up and terminating such agency, and in so doing he simply acts in lieu of the officers of the bank. He replaces them, *stands in exactly their shoes*, so far as the assets are concerned, and their knowledge necessarily becomes his knowledge."

We will not pursue this argument any further.

On page 86 of appellant's brief it is stated that "if the bank itself had paid this mortgage, it would have been subrogated," etc.

Of course this statement is in direct conflict with the authorities, to which we have referred the court, holding that the bank could not purchase or enforce

the mortgage under the existing circumstances. The idea of subrogation is not seriously entertained by appellant. Subrogation is an equitable remedy, which only arises from considerations of justice and equity, and it never is recognized so as to interfere with intervening rights of others. It will not be decreed against a superior or equal equity.

“Subrogation takes place only when one has performed the obligation of another or has paid his own debt, the burden of which has for a consideration been assumed by another, or when he has paid encumbrances for the protection of his own title, the payment of which he has not assumed by contract. The debtor, on whom rests the ultimate obligation of discharging the debt, cannot, by his payment, acquire any right of subrogation”. Sheldon Subrogation 46, 2 Pomeroy Eq. Jur. 797.

To decree subrogation, equity will not interfere with intervening rights of encumbrances. It will not be decreed against superior or equal equities.

That the results are different from what was anticipated makes no difference.

Kleimann vs. Giesselman, 35 Am. St. R. 761.

When subrogation is decreed it must be in accordance with some principle of equity which operates in connection with the justice of the case to give the right of subrogation.

Bohn vs. Kennedy, 60 N. W. 579;

Meeker vs. Larson, 90 N. W. 958.

The case last cited contains a full discussion of the subject.

Mistake of law will not create a right of subrogation.

Meeker vs. Larson, 90 N. W. 958;

Kleimann vs. Giesselman, 35 Am. St. Rep. 761,
and note;

20 Am. and Eng. Encyc., page 816.

The cases cited by counsel on this subject have no application. They are cases in which the vendee assumed the payment of the mortgage, but, having failed to do it, the vendor was compelled to pay the mortgage, his debt, for his own protection.

The cases hold that, under such circumstances, he is subrogated and may foreclose the mortgage against the estate in the hands of his vendee, but this is only in those cases where no intervening equities have arisen. We submit to the court that the cases of this character cited by appellant have not the remotest application to the case at bar.

On page 88 of respondent's brief is found an argument to the effect "that the equities of the lien claimants, being in no way altered by the purchase of the money, it can be enforced."

The cases holding that the man who assumed the mortgage, or who warranted the title against it, could not afterwards purchase the mortgage and hold it against the estate and the intervening rights of third persons, are all cases, perhaps, that present

the same feature exhibited by this case, to which counsel alludes. It is true that if the mortgage had not been purchased, it could have been foreclosed by the Penn Mutual Insurance Company, the holder thereof, but what has that proposition to do with the question? The rules of law and equity prohibit the purchase and enforcement of a mortgage under such circumstances. Is it any answer to that rule to say if the mortgage had not been purchased by the Bank Supervisor it could have been foreclosed by someone else; that therefore the parties in interest are not injured and the rule does not apply? It seems absurd. On the contrary the parties were not left in the same situation when the Bank Supervisor purchased the mortgage. They had the promise of the bank to pay and discharge it, and now, when the bank, through its representative, not only fails to do so, but purchases and undertakes to enforce it, the court will not tolerate an answer which merely states in effect: "Well, if I hadn't foreclosed this mortgage, the holder would have done so. Therefore, you are not injured and therefore you have no right to complain because I purchased it instead of paying it."

The intervening third persons, and the building company as well, are injured. Instead of having the mortgage discharged, it is sought to be enforced against them and the estate as a liability. The equity of the lienors under such circumstances is apparent.

The application of the rule that he who assumes the payment of the mortgage, under such circumstances, cannot take it and enforce an assignment of it, does not depend on whether the parties are placed in any worse position by his buying it than they would be if he let it alone. It depends on considerations of equity which prevent him from doing it.

IF THE BANK ITSELF COULD NOT HAVE TAKEN AN ASSIGNMENT OF THE \$70,000 MORTGAGE SO AS TO ENFORCE IT AGAINST THE PROPERTY, COULD THE SUPERVISOR OF BANKING DO SO?

The proposition stated above may be expressed in this form:

If the rules of equity prohibited the bank from purchasing and asserting this mortgage because such a course would be a violation of the equities of others entitled to the protection of these courts, did the Supervisor of Banking occupy a relation to the trust estate and to those interested in it which would permit him to take that course?

The Supervisor of Banking was acting under the authority of the laws of the State of Washington, and his duties and powers are briefly defined in this statute in the following words:

“Upon taking possession of any bank or trust company, the examiner shall proceed to collect the assets thereof and to preserve, administer and liqui-

date the business and assets of such corporation. With the approval of the Superior Court of the county in which such corporation is located, he may sell, compound or compromise bad or doubtful debts and, upon such terms as the court shall direct, sell all real estate and personal property of such corporation."

Session Laws of 1917, 271;

2 Rem. Compiled St. of Washington (1922)
§ 3269.

The foregoing provision contains all of the statute referred to which affects the question we are now presenting. An examination of it shows its very general character. There are no suggestions in it as to the manner in which his duties shall be performed, and it is only by reference to a subsequent provision of the law that we infer from it that his duty is to pay off the creditors and depositors and then to deal with the residue of the estate, for the benefit of the stockholders, in the manner pointed out by the statute. The language is not unlike that which is found in decrees appointing receivers or administrators.

It is not to be concluded, however, from the absence of specific provisions on the subject, that the Supervisor of Banking is in any sense an autocrat, at liberty to administer the estate in an arbitrary manner. On the contrary, applying the rule that is applied in analogous situations, we know that

the meaning of the statute in question is, that the estate shall be administered in accordance with the existing law on the subject, and, in the absence of any statutory provisions controlling this question, we know the statute contemplated that he should administer the estate in accordance with the common law of the land. To make the statement more accurate, it was his duty, in the absence of specific directions in the statute itself, to administer the estate in accordance with the general law regulating and defining the duties of those who hold the same positions, or positions analogous in law to the one in question.

The building company itself and the lienors, having acquired liens on the property while the title thereto stood in the name of the building company, under a warranty deed to which was added an assumption by the bank of the mortgage in question, had certain equities which a receiver of any character was bound to respect in his administration of the estate.

“The general rule is that a receiver takes the property of which he has been appointed in the same plight and condition and subject to the same equities and liens as he finds in the hands of the person or corporation out of whose possession it is taken.”

34 Cyc. 103.

“A receiver holds the property coming into his hands by the same right and title as the person for

whose property he is receiver, subject to liens, priorities and equities existing at the time of his appointment. He becomes merely the assignee of the insolvent and has exactly the same rights."

23 R. C. L. 56.

To the same effect see:

23 R. C. L. (Receivers) 360;

Ryder v. Ryder, 32 Atl. 919;

7 Corpus Juris 735, Sec. 502;

Arnold v. Wiener, 58 N. W. 709-12;

5 Cyc. 560;

New Jersey So. Ry. Co. v. R. R. Comrs. 41 N. J. L. 235;

Citizens Bank v. Kretschmaur, 44 So. 930-2.

"Assignees, trustees in bankruptcy and receivers are not purchasers for value but take the estate of the insolvent subject to all set-offs, liens in encumbrances and in the plight existing at the date to which his title is ultimately referred."

Nix v. Ellis, 45 S. E. 404.

"We understand it to be the established doctrine both in England and in this country, that assignees in insolvency or bankruptcy, whose rights as representing the general creditors are certainly as great as those of a receiver of a partnership, in the absence of fraud and statutory regulations, take only the debtors' rights and consequently are affected with all claims, liens and equities which would affect the debtor if he himself were asserting his interest in the property."

Lawson v. Warren, 124 Pac. 46.

“His (the receiver’s) title to the property of the debtor is exactly the same as the title of the debtor himself at the moment when it goes into the receiver’s hands.”

Miller v. Savage, 60 N. J. Eq. 204, 4 Atl. 652.

“It is insisted that the assets of the bank existing at the time of the act of insolvency included all its property without regard to any existing liens thereon or set-offs thereto. We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or contemplative of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated.”

Scott v. Armstrong (U. S.) 36 L. Ed. 1059.

Beach on Receivers, Alderson’s Ed., Sec. 667,
p. 718;

Hyde v. Linde, 4 Comstock, 387-92;

Howe v. Harding, 76 Texas 17;

Jordan v. Harris, 135 S. W. 830;

Montgomery B. & T. Co. v. Walker, 61 So. 951;

Cutler v. Fry, 240 Fed. 238;

Brady et al. v. Cobbs et al., 211 S. W. 802;
Finley v. Young, 210 S. W. 143;
Realization Co. v. Roth, 166 N. Y. S. 388;
 23 Am. & Eng. Encyc. 1062;
Hamor v. Taylor Rice Eng. Co., 84 Fed. 392;
Gillette v. Moody, 3 N. Y. 479;
Atty. Gen. v. Guardian Mut. L. Ins. Co., 77 N. Y. 272.

Authorities sustaining the foregoing proposition might be cited without number, and we take it that the cases cited thoroughly establish the proposition that, when Duke took possession of the assets of the Scandinavian American Bank, he took the property subject to all the rights and equities of others lawfully created, and the same may be said of his position when he succeeded to the rights of the bank to the balance due for the purchase money of the lots; and when he took the mortgage for \$600,000 he took it subject to the equities of others affecting the property embraced within it and affecting its validity; and when he sought to enforce the rights of the bank against the property in question, his right to do so was subject to the valid and subsisting equities of the building company and the lienors. He could not occupy a higher position or one more free of these responsibilities than could the bank itself.

In addition to this, when he attempted to assert the \$70,000 mortgage against the property in question, in violation of the warranty of the bank and its agreement to pay the same, he could not enforce

it, freed of the equities of those whose rights had attached, to have the mortgage cancelled and discharged and to have it so treated in this manner.

IN ANSWER:

In this connection we desire to call the attention of the court to the argument of appellant which is opposed to the foregoing argument by us, and which is found on pages 47 to 65, under the headings, "*The Bank Comimssioner was not an Agent of the Bank*", and "*Haskell was an Officer of the State of Washington.*"

We will not attempt to follow in detail this argument, nor will we attempt to answer or criticize the authorities contained in it. Both the argument and the authorities are directed to what may properly be called an immaterial aspect of the question.

It is not a matter of much importance in this case whether Duke was an agent of the bank. We have not contended that he was, and we do not dispute that Haskell was an officer of the State of Washington. Both of these propositions, in certain aspects, are admitted, but what have they to do with the question of the manner in which Duke and Haskell were required to administer the assets and estate of the bank? Various and sundry authorities are collected together in this argument which settle many questions arising under the various statutes creating the officers under consideration.

It may be conceded, as was laid down in one of the cases, that the bank commissioner or examiner,

or whatever he may be called, had the power to levy an assessment, without applying to a court of equity to authorize it. This and the other questions presented in these cases depended on the express or implied powers derived from the language of the statute creating the office. With these powers we have nothing to do.

It will be observed, however, that among all the cases cited by appellant in this argument there is not one which discusses the question how and in what manner the Bank Supervisor or examiner shall deal with the property and estate in his hands or to what extent he is charged with the duty of recognizing and respecting the equities of others. This is the question involved in this case, but the cases cited by appellant throw no light on it whatever.

We have not contended that Duke was acting as a receiver appointed by a court, nor have we questioned any of the powers conferred upon him by the statute of the State of Washington to which we have referred the court.

Counsel for appellant, however, on page 48 of their brief, impliedly intimate that the Supreme Court of the State of Washington has decided adversely to our contention, which is, that in the absence of any clear expression or definition in the statute itself of the manner in which the estate should be administered, the law required it to be

done in accordance with the rules and practice applicable to analogous situations. On the contrary, however, our foregoing statement is the law of the State of Washington.

In the case of *Moore vs. Am. Sav. Bank & T. Co.*, 111 Wash. 148, 158, the court used this language:

"The insolvency of the bank and the taking possession by the examiner could not destroy nor affect this lien. He would take possession of the bank subject to all equities and rights existing in any one else. In 34 Cyc. at page 193, it is said:

'The general rule is that a receiver takes the property of which he has been appointed in the same plight and condition and subject to the same equities and liens as he finds it in the hands of the person or corporation out of whose possession it is taken.'

"In 23 R. C. L., at page 56, it is said:

'A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment. He becomes merely the assignee of the insolvent, and has exactly the same rights.' "

This, we think, is a very clear statement by the Supreme Court of this State in construing the banking act, that in the administration of the estate, with respect to matters such as are involved in this case, the Supervisor of Banking is governed by the

substantive law relating to the rights and duties of receivers.

We believe that the rule laid down in this case, being one construing a statute of this state, is controlling on this court.

In the case of *People's State Bank of Lakota vs. Francis et al.*, 79 N. W. 853, the court said:

"It would, we think, be a surprising holding to declare that a receiver of a bank could enforce all unmatured commercial paper that he found among the bank assets, irrespective of the equities existing against such paper. And yet that must logically follow, if the knowledge of the bank is not to be imputed to the receiver. The fact is the receiver of a national bank is neither an indorsee nor an assignee for value. He is simply an agent and officer of the United States. .*Ex parte Chetwood*, 165 U. S. 456, 17 Sup. Ct. 385, and cases cited. The government places him in charge of one of its financial agencies for the purpose of closing it up and terminating such agency, and in so doing he simply acts in lieu of the officers of the bank. He replaces them, stands in exactly their shoes, so far as the assets are concerned, and their knowledge necessarily becomes his knowledge. It follows, therefore, that whatever the receiver did, by way of extending time of payment, was done with full knowledge that Mrs. Francis was surety only."

It will be observed that in his argument appellant, while pointing out various aspects of the rights and

powers of bank examiners and supervisors derived from the statute, and their affirmance in these cases, nowhere, in express terms, disputes the proposition, either by reason or by authority, that in the absence of controlling provisions in the statute the bank supervisor or examiner is controlled by the law relating to receivers or assignees in insolvency or bankruptcy, or officers acting in analogous positions. If the statute relating to the subject is silent with respect to these duties and powers, then what is the law that regulates them? Counsel has not made a suggestion to the court on this subject. He surely does not intend to take the position that the bank supervisor or examiner is not controlled by some law. He is not an autocrat.

It is not within the province of the Legislature to write into each and every one of its acts all the law pertaining to the subject. Certain general phrases or terms are used which indicate that branch or department of the law which will control the situations created by the legislative act. It is a rare thing, indeed, that in the creation of an office the Legislature should undertake to write all the law pertaining to it into the body of the act itself. The rule is, in the absence of express provisions, that the law applicable to analogous situations is the law applicable to the one under consideration; otherwise there would frequently be no law on a subject.

We must conclude that, regardless of the question whether Duke was an agent of the bank and whether Haskell was an officer of the state, inasmuch as the Legislature in passing the Banking Act was silent on the questions of their duties under the situations and circumstances presented by this case, there is some law of the land which controls, restrains and directs them and all the cases to which we will hereafter refer the court, as well as the decision of the Supreme Court of the State of Washington, to which we have referred the court, clearly indicate that the law applicable to analogous situations prevails, and that is the law applicable to receivers, assignees, etc.

We need not pursue this argument any further.

THE SUPERVISOR OF BANKING IS ATTEMPTING IN THIS ACTION TO ENFORCE THE CONTRACT OF THE BANK IN PART AND TO REPUDIATE IT IN PART. CAN HE DO SO?

It has been demonstrated that the bank assumed and agreed to pay the mortgage for \$70,000, in consideration of the payment by the building company of \$350,000 for the lots covered by it (Transcript 1129-1132, 1237).

It has been shown also that the bank warranted that the property in question was free from all encumbrances.

It also appears that the Simpson mortgage was given by the building company after the conveyance

of the property to it by the bank and that it purports to be a first mortgage.

Duke, in his complaint in this action, sought to foreclose the \$70,000 mortgage and to enforce a purchase money lien for the \$350,000, the purchase price of the lots, and to foreclose the Simpson mortgage for \$600,000, although he subsequently apparently abandoned his theory of a lien for the purchase money and seemed to take the position that the \$350,000 was secured by the Simpson mortgage. What his position will be in this court on the subject we are not now advised. He is thus in the attitude of seeking to recover for the contract price of the lots and on the mortgage in question, while he is repudiating that part of the contract which bound the bank to pay this mortgage; he is repudiating the warranty in the deed, which has the same legal effect in this court; he is seeking to enforce the \$600,000 mortgage given on the lots after the conveyance of them by the bank to the building company.

He cannot affirm the contract in part and repudiate it in part. He cannot derive the benefit of it and refuse to be bound by the burdens and obligations contained in it. No principle or rule is better settled than this.

It is optional with a receiver to perform the executory contracts of his principal. If, however, he does elect to perform an executory contract, he cannot perform it in part and repudiate it in part; nor

can he escape from the legal rights of the parties which necessarily flow from his performance.

23 R. C. L. (Receivers), Sec. 80;

Howe v. Harding, 13 S. W. 41.

See, specially,

Com. Pub. Co. v. Beckwith, 60 N. E. 642;

Cent. Trust Co. v. Ohio Ont. R. Co., 23 Fed. 306;

Ann. Cas. 1912 C. 950;

Spencer v. Wob. Col. Exp. 45 N. E. 250;

Clyde et al. v. Richmond & D. R. Co. et al., 63 Fed. 21;

Citizens' Bank v. Kretschmaur, 44 So. 930-2;

Howe v. Harding, 76 Texas 17 (S. C.) 13 S. W. 41.

In the case of *Howe v. Harding*, cited above, it is said:

"If appellant, after making known to the court that appointed him, that the contract proved had been made before his appointment, had asked that he be permitted to use the right of way, but that he be relieved from paying for it in accordance with the contract, that court would not, and legally could not, have given such permission without at the same time requiring appellant to make the compensation agreed upon for the right of way which the receiver necessarily had to use or acquire another to preserve the continuity of the line."

In the same case the court said:

"It is also erroneous to assert that a court appointing a receiver is under no obligation to continue in force, and in some cases to cause to be fulfilled, the personal contracts of the company, though they may have been improvidently made. The continuance of the obligation of contract is not dependent on the will or act of a court, nor can the court in any proper case refuse to execute them."

This case was afterwards again before the court and is reported in 84 Texas, page 75, and it was held that the receiver was bound to pay the stipulated sum for water so long as it used the right of way.

The question was somewhat fully presented to the Supreme Court of the State of Washington in the case of

Crawford v. Gordon, 88 Wash. 553.

In this case it seems that a receiver had been appointed in the State Court for a railroad, but subsequently the Federal Court appointed a receiver of the same property. The Federal receiver bought a number of cars at an agreed price and made a partial payment therefor and certain equipment bonds were issued for the deferred payments. The cars had been sold under a conditional sale contract reserving title in the vendors. The Federal Court made an order quashing all the proceedings and declared that it had no jurisdiction, and it especially quashed the order authorizing the purchase of the cars. Thereupon the property passed into the hands

of the receivers in the State Court. A controversy arose between them and the vendors of the property. The question seems to have come up in a peculiar way, but the lower court held that the bonds issued by the Federal receiver were void, and refused to permit the owner to prove the reasonable value of the cars unless he would release all claims under the equipment agreement or contract of sale. The court held that when the receiver in the State Court took the property and commenced to use it, it ratified and affirmed the contract of sale made with the preceding receiver. They held that the receiver could not repudiate the contract made by his predecessor, and they also held that under the facts in the case, that the receiver did not repudiate the contract, but affirmed it, he was bound to carry it out according to the terms thereof. The court also said that the obligation rested on the receiver to determine, within a reasonable time, whether he would deny or affirm the contract and that his conduct amounted to an affirmance.

In the case of *In re DeLong Furniture Co.*, 188 Fed. 686, there was an assignment of a debt by the furniture company to the bank. Insolvency and bankruptcy of the debtor intervened while the contracts upon which the payment of the money depended were still executory. Apparently the receiver and trustee carried out the contracts and received the money but refused to pay it to the bank. The court said that inasmuch as they elected to

carry out the contract, they stepped into the furniture company's shoes and became bound to devote the proceeds to the object agreed upon.

A receiver cannot abrogate or annul existing contracts of his principal. His power in respect to them is limited to a refusal to carry them out or to a performance of them.

23 R. C. L. (Receivers), Sec. 80;

Ann. Cas. 1912 C. 950;

Hyde v. Lynde, 47 N. Y. 387;

Wolf v. McNulta et al., 52 N. E. 896;

Chem. National Bank v. Hartford Dep. Co., 41 N. E. 225.

The mortgage purchased by the bank supervisor secured the debt of the bank. In addition to this fact, the bank had expressly assumed and agreed to pay this debt. In addition to this fact, it had conveyed the land by warranty deed and before the bank supervisor paid the mortgage the liens of the defendants had attached. In addition to all these facts, the bank, through its officers, had encouraged and persuaded the Far West Clay Company and other defendants to advance material for the construction of the building, and, in addition to the foregoing facts, the bank was still in one sense the owner of the real estate. In addition to the foregoing facts, the amount of the mortgage was included in the purchase price of the land. In addition to the foregoing facts, the Bank Supervisor is

seeking, in this case, to enforce a lien or claim against the property for the purchase price of the lots, which includes the amount of this mortgage. It was optional with the Bank Supervisor to pay this mortgage or to let it stand. The contract of his principal was to pay it, and, as we have seen by the authorities cited, if it had been done by the bank itself the payment would of necessity have discharged the encumbrance, and for various reasons the bank would not have been permitted to assert it as a lien on the property, particularly against the equities of the lienholders created and existing by the connivance and persuasion of the bank itself.

Under such circumstances, could the Bank Supervisor pay the mortgage and at the same time escape the legal consequences of his doing so? Was not the payment an election on his part to perform the contract of his principals? Can he be heard to say that it was not, when it appears in this action he is seeking to recover the purchase price of the land, which embraces the amount of the mortgage? It is not within the power or province of the individual to determine under all circumstances what is the legal character and nature of his acts and what is the result that flows from them. A man cannot pay his own debt, for which he is primarily liable, and take an assignment of it to himself or to another for him and then claim that he did not intend to pay it. The law declares that it was a payment under such circumstances. It does not

leave to him the right to determine the legal effect of his act.

At the time of the payment of the Penn Mutual mortgage, the bank held, or claimed to hold, a purchase money lien on the property in question and also a mortgage. We do not question the right of the Bank Supervisor to pay the Penn Mutual mortgage for the protection of the other liens held by the bank. It was optional with the Bank Supervisor to pay this mortgage or to leave its holders their legal remedies. If the Penn Mutual mortgage had not been the debt of the bank, and if it was not in any way estopped from asserting it against intervening liens and equities, the bank supervisor would have the right and the power not only to pay the mortgage, but the power also to take an assignment of it for the purpose of protecting its mortgage against the intervening rights, liens and equities of others. Under such circumstances, if the bank bought the mortgage without taking an assignment, it might be subrogated to the rights of the assignor, and in this way the mortgage might be used to protect the liens of the bank against the intervening encumbrance. The Bank Supervisor exercised his option to pay the mortgage debt, but he now claims that he did not in fact pay it, but that he took an assignment of it. The taking of an assignment, instead of satisfying the mortgage, can be ascribed to only one purpose — the assignment was taken for the purpose of using the mort-

gage against the intervening liens and equities. If the purpose in paying the mortgage had merely been to protect the subsequent liens of the bank against enforcement, this purpose would have been fully subserved by the payment and discharge of the mortgage. Then it would have been no longer asserted as a legal claim to conflict with the subsequent encumbrances held by the bank and others. The purchase of the mortgage by the Bank Supervisor and the holding of it by him under the assignment, instead of a discharge and satisfaction of it, was an annulment and violation by the Bank Supervisor of the contract of the bank with respect to this debt.

As we have pointed out, it was optional with the Bank Supervisor to carry out the executory contract to pay the debt, but it was not in his power to annul the contract or to do an act which amounted to a violation of it and thus to annul it. There is a broad distinction between a refusal to execute an executory contract and the performance of an act which is in violation of it. Does the fact that the building company was in default of the payment of the purchase money justify the Bank Supervisor in not only refusing to carry out the contract for the payment of the debt, but in taking a course of action which could only be justified on the theory that the contract of the bank to pay the debt was no longer binding or obligatory on any one, and that it had become a nullity? So long as the promise to

pay the debt was an existing legal obligation, which had not been cancelled or abrogated by the acts of those who were entitled to do so, the Bank Supervisor was limited in his dealings with the mortgage to a mere payment of the same. The cancellation or abrogation of the contract could only have been accomplished by what in law is denominated a "rescission" of it. That there was no actual rescission by the consent of the parties is clear. Could the bank have rescinded the contract when the only ground for a rescission, so far as the record shows, is the failure of the building company to pay the purchase price?

The contract between the bank and the building company was a very simple one. The bank sold the property to the building company for a fixed consideration. The building company agreed to secure the payment of the purchase price by certain bonds secured in turn by a second mortgage. It is now claimed that the second mortgage was not given in accordance with the terms of the contract. So far as the record shows, the failure of the building company to give the mortgage constitutes the only seeming breach of the contract on its part. There was a failure, but no default. The bank did not pay the mortgage either. It was to be paid first. The Bank Supervisor is in the unfortunate attitude in this action of seeking to enforce its alleged claim for the purchase price of the land, accruing by virtue of the contract in question, and by this act he

affirms the existence of the contract and seeks to derive the benefit accruing therefrom. Under such circumstances, can he be heard to say: "I do not repudiate the contract for the purchase price — I affirm it; but I do repudiate or rescind the contract by which the bank bound itself to pay the Penn Mutual mortgage in consideration of the agreement by the building company to pay this agreed price".

Under some circumstances, a party to a contract has the right to elect whether he will rescind and disaffirm the contract and bring an action to enforce his rights in accordance therewith, or whether he will treat the contract as an existing one and bring an action for its breach.

It is an elementary rule of law that where a party is placed in such a situation, when he makes an election, he is concluded by it, and he cannot maintain an action on one theory and then abandon it or seek to enforce it on another; and it is equally well settled, and it follows as a corollary from the main proposition which I have stated, that in the same action he cannot seek relief which is based on an affirmance of the contract and at the same time seek other relief which is based on a disaffirmance or a rescission of it. The authorities on this question are too unanimous and the proposition is too well sustained to require any argument to support it.

It is said that the receiver takes the estate subject to all the rights and equities of others existing at the time of the vesting of the estate in him. We believe, however, that this does not fully define the relation of the receiver to other persons under such circumstances.

Suppose it to be a case of insolvency. The insolvent may have entered into a contract by reason of which certain equities arose in favor of third persons, and this contract may have been in force or unperformed at the time of insolvency. Equities in favor of third persons depend for their preservation on the performance of the contract, or, possibly, on its not being violated by the doing of some act in conflict with it, which would destroy it. Should it be conceded that though the preservation of these equities depends upon the performance of the contract by the insolvent, the receiver might not be required to perform it in order to preserve it, and that whether he does so is left to him to determine — yet, conceding the soundness of this position, is the receiver so complete a stranger to the contract that he may not only refuse to carry out the same, but may take such action in respect to it as to constitute a violation of it, destroying the equities in question? When we speak of violation, we do not mean a mere breach of contract arising from failure to perform it, but we refer to doing something contrary to the contract, inconsistent with it, and contradictory of it.

Where the insolvent has conveyed an estate in land and, as a part of the contract of conveyance, has assumed and agreed to pay a mortgage thereon, though the estate may have passed from the hands of his vendee into those of a third person, yet he is prevented by his contract from paying this mortgage and taking an assignment of it and holding it as an encumbrance on the estate so conveyed against the interests of his vendee and against the intervening equities of third persons. This would be a violation of the contract, not a mere refusal to carry it out, or his act might be construed as a performance of it and the relief be denied him.

When it is said that the receiver takes the property subject to all the rights and equities of others, does this legal conception embrace the idea that the receiver may not violate the existing contracts of the insolvent and seek a benefit therefrom, though they are not directly and immediately connected with any property that comes into his possession as receiver? Is the inability of the receiver to deal as he sees fit with those subjects concerning which the insolvent had made unperformed and binding contracts, limited only to those contracts which directly and immediately concern the property of the insolvent which comes into his hands and from which he derives a benefit and with which he is dealing? This seems to be the primary question involved. To state the proposition in another way:

On the receiver's appointment and his taking possession of the estate of the insolvent, does he become so much a stranger to those contracts and obligations of the insolvent which do not affect and relate to the property in his hands, that he can deal with them at will and violate them and disregard and annul them so as to benefit the estate in his hands — to the injury of the insolvent's vendee, and to the destruction of the rights and equities of third persons which attached to the property affected by the contract by virtue of the contract itself?

The purpose of violating the contract of the insolvent is to obtain some benefit and advantage against the estate conveyed by the insolvent, to which the contract related and by virtue of which it vested. Will equity permit the receiver under such circumstances to thus violate the contract and obtain such a benefit?

The situation presented here, however, is stronger than the one already suggested in this argument.

The Bank Supervisor claims to hold two mortgages on the estate in question, which passed to him from the insolvent, and it is for the protection of these mortgages that he seeks to obtain the advantage arising from an assignment of the Penn Mutual mortgage instead of a satisfaction of it. In other words, the Bank Supervisor has received these two mortgages as part of the estate of the bank, and the question is whether, under the facts in this case, he can be permitted to hold these mortgages free

from all equities of the vendee of the estate and the equities of third persons intervening. In dealing with these mortgages, is he not bound and affected by the equities of the bank in respect to the estate affected by them? It will be remembered that the existence of what is called the "purchase money mortgage," or the balance owing for the purchase money, is due to the very contract which the Bank Supervisor now seeks to abrogate and destroy.

Passing by the fact for the moment that the authority to purchase this mortgage was evidently obtained from the court, on the representation that it was obtained for the purpose of discharging it so that the property would not be charged with the tremendous expense of foreclosure, the question then assumes this form:

The Bank Supervisor, as a part of the estate of the bank, having acquired this mortgage, the very creation and existence of which involved the performance of the contract by the bank, can he now as the holder of this mortgage claim the benefit of it, seek to enforce it against the beneficiary of the contract and intervening equities which arose by virtue thereof, and annul, repudiate and violate the promise to pay the mortgage which was a part of the contract? We think these facts bring the Bank Supervisor clearly within the operation of the rule that he takes the property and estate of the bank subject to all the rights and equities of others which had attached in the hands of the bank. To permit

the Bank Supervisor, under such circumstances, to hold the purchase money mortgage as an asset of the estate and part of its property, and at the same time to repudiate the obligation of the bank on which it was based and by virtue of which it was created, would be a violation of every principle of equity and fair dealing.

THE SUPERVISOR OF BANKING MERELY
THE REPRESENTATIVE OF THE BANK
WITH ALL ITS BURDENS AND OBLIGA-
TIONS.

At the trial of this case it was claimed that, by reason of the fact that the money used to pay the mortgage was the money of the depositors or the creditors of the bank, the rule applicable to receivers did not apply and that in any case it did not apply in the case of a bank.

It was not suggested that the money used by Duke was not the money of the bank or that it was not part of the estate in his hands for administration, nor was any reason suggested for the theory that a rule prevailed in the case of a bank, different from that prevailing in other cases.

There is no provision in our statutes that makes a distinction between depositors of a bank and other creditors. There is not even a distinction between contract debts and those arising in some other manner. From my examination of the question, I have found that in one or two states the claims of general

depositors have a preference over other claims, but this is by reason of a statutory provision. In the absence of such a provision, depositors are simple creditors. As a matter of fact the question has doubtless been before the legislatures of the different states, and we may take it for granted that it has been determined by them that there is no reason why the claim of a depositor should be held more sacred than the claim of any other creditor, and, as a matter of fact, we see none.

When acting within the scope of its powers, subject to the express limitations imposed on it by law, a bank is just like any other commercial or business organization, and its assets constitute its capital, to be handled and disposed of according to the will and judgment of its managers.

Subject to these qualifications, there is nothing that distinguishes a bank from any other commercial organization when it is considered with respect to its rights or its powers or its legal obligations. It has a full right to make and enforce contracts, and it is subject to the same responsibilities that are imposed by law on other corporations doing business. As a result, the winding up of a bank when it passes into the hands of a custodian provided by law for that purpose, takes place in exactly the same manner, from a legal standpoint, as in the case of other corporations, subject only to such modifications or changes as are provided for in the law regulating the subject. Both the text books and the au-

thorities unite in the declaration that, subject to these qualifications, the persons appointed by law to administer insolvent banks possess the same powers and the same duties as are given to or imposed on receivers for insolvent corporations. This is necessarily true, and in the case to which we have referred your Honor, *Moore v. Am. Sav. Bk. & T. Co.*, 111 Wash. 148, the Supreme Court of this state has practically established this proposition in construing our banking law.

Again and again it is announced by the courts that the bank receiver or supervisor, in the absence of any special provisions of a statute on the subject, is governed and controlled by the principles and rules of law applicable to receivers of insolvent corporations.

We desire to refer the court to the following cases directly sustaining this position::

Ward v. Oklahoma State Bank of Atoka, 151 Pac. 852. The court in this case sets forth the statute prescribing the manner in which the bank commissioner should wind up the affairs of the bank — and the provisions of the statute of Oklahoma are practically the same as ours. The court said:

“Considering the rights of the bank commissioner under the foregoing section, this court, speaking through Judge Brewer, in *Briscoe v. Hamer, et al.*, Sec. 4529, 150 Pac. 1101 (not yet officially reported), said:

“ ‘In this situation of the law, it seems to us that the position of the bank commissioner in taking charge and collecting the assets of a failed bank is quite analogous to that of a receiver or trustee in bankruptcy, or of an assignee for the benefit of creditors. As we understand the law, a receiver, an assignee, or a trustee in bankruptcy, takes the estate of an insolvent as he finds it, and succeeds to the rights of and only to such rights as the insolvent had at the time of the adjudication of his insolvency.’

“See, also, *Lawson v. Warren*, 34 Okl. 94, 124 Pac. 46, Ann. Cas. 1914-C, 139.

“Section 5234, R. S. U. S. (U. S. Comp. St. 1913, Sec. 9821), authorizing the appointment of a receiver for a national bank by the Controller of Currency, defines his rights and duties in language almost identical with that employed in our statutes, *supra*, relative to those of a bank commissioner. The Federal Supreme Court, in *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1049, speaking of the rights of such receiver, said:

“ ‘The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached.’

"In *Peoples State Bank of Lakota v. Francis et al.*, 8. Md. 369, 79 N. W. 853, it is held:

" 'Where a receiver is placed in charge of the assets of a national bank, he stands, as to such assets, in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of such assets.'

"Cases may arise in which the bank commissioner can assert rights that an insolvent bank of which he has taken possession could not enforce, but the instant case involved no such principle. The plaintiff bank acquired the note in question from the bank commissioner, who, as we have seen, was not a holder in due course, and its rights as purchaser and holder thereof are in no way superior to his.

"(2) By virtue of the statute above quoted, the bank commissioner could sell the property of an insolvent bank, only upon order of the district court or the judge thereof. Such sale, like the sale of the property of an insolvent national bank by a receiver, is a judicial sale (*In re Third National Bank* (D. C.), 4 Fed. 775); and the purchaser of the commercial paper at a judicial sale is not regarded as a holder in due course (7 Cyc. 927, and cases cited)."

In *Briscoe v. Hamer*, 150 Pac. 1101, the court said:

"In this situation of the law, it seems to us that the position of the bank commissioner in taking charge and collecting the assets of a failed bank,

is quite analogous to that of a receiver or trustee in bankruptcy or an assignee for the benefit of creditors. As we understand the law, a receiver and assignee or trustee in bankruptcy takes the estate of an insolvent as he finds it and succeeds to the rights of and only to such rights as the insolvent had at the time of the adjudication of his insolvency."

The court thereupon proceeds to say that the right of set-off exists as against such a trustee. The court in this case quotes from the case of *Nix v. Ellis*, 45 S. E. 404, as follows:

" 'Assignees, trustees in bankruptcy, and receivers, are not purchasers for value, and take the estate of the insolvent subject to all set-offs, liens and encumbrances, and in the plight existing at the date to which his title is ultimately referred'—citing numerous authorities."

Lawson v. Warren, 124 Pac. 46.

In this case there was a question arising on a conflict of interest between an assignee and a receiver, each of whom held a note secured by the same mortgage. A full discussion of the conditions attaching to an estate, when it passes into the hands of an assignee or receiver, is found in this case. The court, among other things, said:

"We understand it to be the established doctrine, both in England and in this country, that assignees in insolvency or bankruptcy, whose rights as representing the general creditors are certainly as great

as those of a receiver of a partnership, in the absence of fraud and statutory regulations, take only the debtor's rights and consequently are affected with all claims, liens and equities which would affect the debtor if he himself were asserting his interest in the property."

Quoting from the case of *Miller v. Savage*, 60 N. J. Eq. 204, 4 Atl. 652, the court said:

"His (the receiver's) title to the property of the debtor is exactly the same as the title of the debtor himself at the moment when it goes into the receiver's hands."

A great mass of cases is cited to sustain this rule, and it is unnecessary for us to consider them further except the case of

Scott v. Armstrong, (U. S.) 36 L. Ed. 1059.

This case involved the question of set-off under the National Bank act. In this case it is said:

"It is insisted that the assets of the bank existing at the time of the act of insolvency included all its property without regard to any existing liens thereon or set-offs thereto. We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or contemplative of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the

parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated."

In 5 Cyc., p. 560, the rule is stated as follows:

"The receiver represents both bank and creditors and can look behind its acts in asserting the rights they possess. He is entitled to the bank's assets subject to all the equities existing against them, but possesses no rights superior to the bank when it was alive."

The following cases also lay down the same rule with reference to receivers or supervisors of insolvent banks:

Commerce T. Co. v. State et al., 157 Pac. 717;

State v. City of Sapulpa et al., 160 Pac. 489;

Bailey v. State et al., 179 Pac. 615;

Cutler v. Fry, 240 Fed. 238;

Brady et al. v. Cobbs et al., 211 S. W. 802.

See also:

Jordan v. Harris, 135 S. W. 830;

Montgomery B. & T. Co. v. Walker, 61 So. 951.

It will be observed that in Oklahoma, although the bank commissioner acts, the actions are brought in the name of the state.

We submit to the court that no authorities can be found contradicting or controverting the rule stated by us and established by the foregoing cases, as well as numberless other cases. When the Bank Supervisor found himself in possession of the mort-

gage for six hundred thousand dollars and of the agreement to execute a second mortgage with bonds issued thereunder, to secure the payment of the purchase price of the lots in question, he elected to pay the Penn Mutual mortgage in order to protect the estate in his hands and to prevent a foreclosure of it.

It is fair, also, to presume that one of the purposes of the Bank Supervisor was to carry out the agreement to pay off the Penn Mutual mortgage, on the performance of which his right to claim the three hundred and fifty thousand, the purchase money of the lots, depended. The Bank Supervisor still claims the right to recover the three hundred and fifty thousand and stands before this court asking for a decree therefor, and at the same time he asks for a decree for the amount of the Penn Mutual mortgage, against which it warranted the title to the lots and which it assumed and agreed to pay as a part of the consideration for the payment by the building company, of the sum stated.

KNOWLEDGE BY THE BANK SUPERVISOR
OF THE CONDITIONS AND CIRCUM-
STANCES CONNECTED WITH THE WAR-
RANTY AND THE ASSUMPTION BY THE
BANK OF THE PAYMENT OF THE \$70,000
MORTGAGE.

We think it is wholly immaterial whether the Bank Supervisor knew at the time he paid the \$70,-000 mortgage that its payment had been assumed by

the bank. We do not see how ignorance on his part, culpable or not, could affect the rights of other persons or destroy the equitable right of the building company and its privies to have the payment of the mortgage treated as a discharge of it. This question, however, is thoroughly discussed in the following case:

Peoples State Bank of Lakota v. Francis et al.,
79 N. W. 853.

In this case the receiver granted an extension of a note. It appeared that one of the parties was a surety. The question arose whether this act of the receiver discharged the surety. The doctrine was invoked that the discharge of the surety does not take place except where it is made with knowledge of the relation of the parties. The court rejected this idea. The court used this language:

“Did the receiver stand in a better position? Appellant urges that the surety must affirmatively show knowledge of the suretyship on the part of the creditor who grants the extension in order to claim a release thereby. As a general proposition, that is doubtless correct, but it will be sufficient if the facts appear from which the law will presume such knowledge. Certainly, in this case, the receiver had not acted on the faith of the apparent character of Mrs. Francis as a principal within the meaning of our statute. That statute contemplates acting to his detriment, and operates by way of estoppel. It is urged that the receiver was not chargeable with the

knowledge of the facts that were known to the bank. This is an unwarranted contention. It would, we think, be a surprising holding to declare that a receiver of a bank could enforce all unmatured commercial paper that he found among the bank assets, irrespective of the equities existing against such paper. And yet that must logically follow, if the knowledge of the bank is not to be imputed to the receiver. The fact is, the receiver of a national bank is neither an indorsee nor an assignee for value. He is simply an agent and officer of the United States. *Ex parte Chetwood*, 165 U. S. 456, 17 Sup. Ct. 385, and cases cited. The government places him in charge of one of its financial agencies for the purpose of closing it up and terminating such agency, and in so doing he simply acts in lieu of the officers of the bank. He replaces them, stands in exactly their shoes, so far as the assets are concerned, and their knowledge necessarily becomes his knowledge. It follows, therefore, that whatever the receiver did, by way of extending time of payment, was done with full knowledge that Mrs. Francis was a surety only."

IN ANSWER:

On page 76 and the pages following of appellant's brief there is found an argument under the heading, "The Bank Commissioner was under no legal obligation to satisfy this mortgage and pay the debt and he could not legally do so"; and he also takes

the position that the funds were trust funds in the hands of the Bank Supervisor and that a resulting trust arose, etc.; and he again makes the statement in this argument that the bank was not under any obligation to pay the mortgage, which latter statement is, of course, wholly incorrect.

Counsel seems to be chiefly concerned with the proposition, that the satisfaction of this mortgage by the Bank Supervisor would have resulted in the preference of one class of creditors over another, and he cites cases involving this doctrine. These cases, however, have no application here.

The act of the Bank Supervisor, from any standpoint, was intended for the protection of the estate in his hands, and the persons incidentally benefited thereby were not creditors of the bank.

If the receiver of a corporation carries out a contract made by the corporation for the purpose of benefiting the estate, the mere fact that it might incidentally benefit someone else does not affect the question of his right to do the act or its validity when it is done. This is more like the situation presented in this case.

As to the proposition that the Bank Supervisor, who could not take an assignment of this mortgage and use it against the estate conveyed by the bank, yet when he used the funds of the estate to do so, a resulting trust arose in favor of the estate by reason of the alleged wrongful use of the funds, we have this to say:

Counsel does not cite a single authority to sustain this extraordinary proposition. If it be true that a resulting trust in this mortgage arose in favor of the Bank Supervisor for the benefit of his estate, it does not follow from this fact that this trust would overturn the equity of others of the lienors so as to entitle him to enforce the mortgage. If the mortgage, in which a resulting trust arose, is of no value unless it can be enforced, that is the misfortune of the Bank Supervisor, but I cannot imagine that a resulting trust could arise under such circumstances to overcome and destroy the equities of the lienors to which we have referred. There may be a trust in the mortgage, but the mortgage cannot be enforced. It may be a valid debt against the makers.

It must be borne in mind that the amount of this mortgage was included in the \$350,000 to be paid by the building company for the lots. We have no idea that this proposition will be in any manner disputed, although in one part of appellant's brief he says that the property was well worth \$350,000, which, of course, is incorrect. For fear that the matter may be disputed, we will state the following facts:

Mr. Pringle, who was president of the bank at the time lots 11 and 12 were bought, the building being on them, stated that the price was about \$275,000 and that the bank paid about \$210,000 in cash, leaving a mortgage for \$65,000 on the property (Tr. 1129-32), and the mortgage now under considera-

tion is the successor of this mortgage. Drury conveyed lot 10 for \$65,000, which the bank paid, and this sum was added on to the purchase price of the lots.

The figures don't fit exactly because, as stated by Mr. Larson, there were some items of interest, etc., involved in them. This made the cost of the entire property to the bank about \$275,000, with the \$70,000 mortgage added thereto, which made the \$350,000 which the building company proposed to pay to the bank through bonds (Tr. 120).

There seems to have been some confusion in the minds of the subordinates in the bank as to what the equity of the bank in the original property was. (Tr. 1122-3, Tr. 1084).

The Bank Examiner or Supervisor kept insisting that the bank should show the amount of the mortgage as one of the liabilities of the bank, to offset the price at which the property was being carried (Tr. 1100). There seems to be considerable sensitiveness in the bank officials on this subject and, in order to avoid showing this mortgage as a liability, they actually obtained a release from the Penn Mutual of the bank from liability for this mortgage. The bank examiner counseled them to show the mortgage in their statements, and we refer the court to the statements in the transcript, as follows: 1084, 1102, 1104, 1237, 1242, 1244, 1246.

There can be no doubt whatever that in the \$350,000 purchase price of the property the Penn Mutual

mortgage was embraced, and this is the sum for which appellant seeks to enforce a purchase money lien in this action. There can, of course, be no question that as a part of the promise to pay \$350,000 for the lots the bank assumed the mortgage.

We believe it should not be questioned that, if Duke had taken this money and with it had deliberately paid and discharged the mortgage for the protection of the estate, his act would have been unimpeachable and no claim could have been made that an equity or right of subrogation to the rights of the mortgagee arose from the transaction, in his favor, for the benefit of the creditors or depositors. Such an act would have been strictly within the limits of his duty to protect the estate in his hands by paying off an encumbrance prior to the Simpson mortgage and the purchase money lien, and by saving it from the dangers arising against it by reason of the breach of its warranty of the title to the real estate. If he could do this, it is simply because the money is in his hands, subject to be properly used in the administration of the estate. It is not the money of the creditors or the depositors; it belongs to the estate, to be used as the balance of the estate is subject to use, for its benefit, but not subject to use in violation of the rights and equities of others which had attached while the estate was in the hands of the bank.

While, speaking in general terms, the Bank Supervisor might not be compelled to carry out a con-

tract of the bank, unwise or unprofitable in his judgment, for the mere purpose of protecting these equities, yet the law declares that these equities, so far as the bank and he are concerned, are inviolate, and any act of his disregarding or doing violence to them must fail in its purpose. Having done such an act, he cannot call on a court to aid him in rendering it effective. He cannot say:

“I know I had no right to do this but I did it, and having done it, what are you going to do about it? If the court refuses to aid me in enforcing the mortgage, the depositors and creditors will suffer. Therefore, in their behalf, my wrongful act must be enforced, in my name, for their protection, notwithstanding the fact that what I did was done by means of and through the agency of the estate in my hands for administration. I will not stand by and permit the mortgage to be foreclosed and the estate and the rights in my hands to be jeopardized or impaired in this way, or subjected to a claim for damages for a breach of the warranty. I think the wisest course would be for me to buy this mortgage with the funds of the estate and enforce it myself, and myself inflict the damages arising from its foreclosure, on the estate I represent.”

Thus he could, as appellant claims, without any responsibility, use the funds of the estate to violate the contract of the bank and injure the estate itself by subjecting it to damages; and, when his right to do this is denied, he could answer, “This is the money of the depositors and creditors. They are not

concerned with the contracts of the bank. By the insolvency of the bank, its estate became disentangled from its contracts and became the absolute property of the depositors and creditors, to be administered for their exclusive benefit, unhampered by any equities or rights that the bank may have created by its contracts."

In view of the authorities cited by us, the mere statement of this proposition is an answer to it.

In one case we read while writing this brief, which we have not been able to find again, the court said that if the insolvency of a corporation had the effect of altering, destroying or affecting the existing rights and equities of others, its utility and value as an instrument for the transaction of business would be destroyed; that no one would do business with an institution, the validity and enforceability of whose contracts depended on the continuance of its solvency.

There can be no question that when the mortgage was purchased by Duke, it inured under the warranty, to the benefit of the building company, and those in priority with it, the lienors.

While writing this brief our attention has been called to the brief of Tacoma Mill Work & Supply Co. at the bottom of page 92 and the pages following.

Counsel refers to the pages of the *transcript of the testimony*, which is not before the court. We think the substance of the testimony to which he refers is found in the *transcript of the record* at pages 1122-1123.

THE SIMPSON MORTGAGE FOR \$600,000, THE PURPOSE OF WHICH HAVING FAILED, WAS THEN, FOR PRUDENCE AND CONVENIENCE, ASSIGNED TO THE BANK. ITS ENFORCEMENT HERE.

Though it may be repetition, we will again refer the court to the pages of the transcript containing the evidence necessary to the determination of the question of the enforcement of this mortgage.

Simpson executed a declaration of trust, declaring that he held the mortgage in trust for the building company to raise funds which were to be the property of the building company. It is specific and exclusive in its declarations. (Transcript 1010).

The mortgage was not given to secure future or existing advances by the bank. (Transcript 1018-19, 1047, 1051).

The assignment of the mortgage was not made to secure the bank, but was prompted by considerations of prudence and convenience. (Transcript 1048, 1051, 1085, 1033).

The bank bought the stock of the building company with the \$200,000 placed to the credit of the building company. It was not an advance by the bank to the building company. (Transcript 1026-7, 1032-3-4, 1097, 1119).

The payment of the purchase price of the lots was not secured or intended to be secured by this mortgage. It was to be paid by bonds issued under the

second or \$750,000 mortgage. (Transcript 120, 1017, 1106, 1123, 1129-1132, 1237).

Although the facts clearly demonstrate that the assignment of this mortgage was not made as collateral security, yet Duke claims that it was and has sought to enforce it accordingly.

Answering this position, we desire to say:

We will not enter into an elaborate discussion of the proposition that Simpson, holding the mortgage as trustee of an express trust, had no power to assign it to the bank, contrary to the terms of his declaration of trust, as collateral security or for any other purpose. The act was void. We think this is elementary.

If the assignment was valid for the purpose of merely passing the title, the evidence shows that no subsequent act of the building company devoted or applied it to the purpose for which certain officers of the bank subsequently sought to hold it. There was no act on the part of the building company or its officers diverting it from the purpose for which it was given, or definitely applying it to a purpose that was not in harmony with the object of its creation, but which, on the contrary, was in conflict therewith. We believe the mortgage could not be used. It became a nullity when its purpose failed. We believe the act of some officers of the bank in subsequently declaring this purpose, or in even conceiving or carrying it out, if they did it, could not give it life.

The assignment was not made until October 7, 1920. At that time the Far West Clay Company, Savage-Scofield Company and the other lienors furnishing builders' materials had already made their contracts therefor and had begun to furnish the same under entire contracts. It is the established rule that even if the assignment of the mortgage, as collateral security, was valid, the lien of the mortgage did not accrue before the time when the assignment was made, if it accrued then, and it is therefore subsequent to these liens.

Under our statute, mechanics' liens are preferred to any lien or mortgage which may *attach* subsequently to the time of the commencement of the performance of the labor or the furnishing of the materials, and are also preferred to any lien or mortgage which may have attached previously to that time but which was not filed or recorded and of which the lien claimant had no notice.

2 Rem. & Bal. Code, Sec. 1132.

The statute makes a clear distinction between mortgages which had not attached at the time of the furnishing of the labor or materials, and those which had attached but which had not been recorded and of which the mechanic or materialman had no notice. It is clear from a reading of the statute that the primary test of priority is the attaching of the mortgage or incumbrance. The secondary test is the recording of it after it has attached or notice of it after it has attached. The primary

question, therefore, is: "When does a mortgage attach?" Several situations of the parties which affect this question readily suggest themselves. It is an elementary rule of law that an instrument does not take effect until delivered. It cannot, of course, attach prior to delivery for the purpose of taking effect. The word "attach", as used in this connection, has a definite legal signification. It means that the instrument has taken effect in such manner as to then and there confer upon the person to whom it is made or delivered certain fixed and definite rights. This implies that these rights are of such a character as that they may be claimed or enforced against the rights of others subsequently arising which conflict therewith. The conception of priority in legal rights involves the idea of some substantial basis upon which they rest, either a present consideration or the assumption of a present duty or obligation, binding upon the party assuming the same.

A mortgage may be executed and delivered which secures a sum of money to be advanced in the future, where the obligation to advance the money is a fixed and binding one, and the instrument will be treated as attaching from the time of delivery, although under certain circumstances its operation as a prior lien may be arrested by the intervention of equities arising under various circumstances and conditions. It is, however, essential to the existence of the mortgage or encumbrance as a prior right that it should

attach at some definite time. If the money secured by the mortgage is advanced at the time, the mortgage attaches from that time.

In this case, the mortgage was executed and delivered to Simpson and was recorded. Simpson paid nothing nor did he bind himself to make any payment. He took the mortgage for the purpose of selling it in the open market. This mortgage, therefore, did not attach until some one bought it or entered into a valid and binding contract to advance the money thereunder.

The authorities are unanimous to the effect that a mortgage, issued under the circumstances shown in this case, does not attach until it has been delivered to some one who has paid the money therefor, or who has taken it and entered into a valid and enforceable contract to advance the money therefor.

In the case of *Schafer v. Reilly*, 50 N. Y. 61, the mortgage was executed, delivered and recorded. It was payable to one who advanced no money on account of it and who merely took it for the purpose of negotiating the sale. At a subsequent time, it was sold to a *bona fide* purchaser without notice, this purchaser taking the precaution to require from the holder of the mortgage an affidavit that all the money secured thereby had been advanced and paid. Prior to the time of the purchase of the mortgage, mechanics' liens had entered in. In a well considered opinion, the court held that the liens took priority over the mortgage; that the mortgage had not

attached until it had been sold to the purchaser, who paid a consideration therefor, and that the liens therefore had accrued prior to the time when the mortgage attached.

It will be observed in this case that, unlike the case at bar, the purchaser had no notice of the facts. In the case at bar, the bank, at the time it advanced its money and at the time it took the assignment, had full notice that no consideration had been paid for the mortgage, and that it had therefore not attached and that liens in the meantime had accrued.

See, also,

Hewson-Herzog Sup. Co. v. Cook, 54 N. W. 751;

Finlayson v. Crooks, 49 N. W. 398, 645;

Blackmauer v. Sharp, 50 Atl. 852 (See discussion on page 858 Col. 2);

27 Cyc. 239-40.

Where lien attaches in part, prior to mortgage, the labor and supplies furnished afterwards in continuation of contract have also priority.

27 Cyc. 247 (4).

It is perfectly clear that the Simpson mortgage was never assigned to the bank as security and that at the time it was made it was not so intended.

If it was assigned to the bank as security, in October, 1920, the lienors furnishing builders' materials had already begun to furnish them under their contracts, and the mortgage was subsequent

thereto under our statute referred to, and under our decisions, and their future advance of builders' materials, under their contracts, would take precedence over future advances made by the bank.

This question is more fully discussed in the brief of Hayden, Langhorne & Metzger and the desire to adopt the arguments on the subject therein contained.

BANK ESTOPPED TO ASSERT MORTGAGE.

It appears that the officers of the bank and the building company represented to many of the materialmen, and caused it to be generally understood, that the money to build the building had been arranged for. We know that the Simpson mortgage, to be floated in the East, was one of the chief sources of money which the bank had in mind in making these representations, and that these materialmen relied on these representations. That they were untrue may be treated as established.

Will equity permit the bank to take this mortgage, hold it as security for its advances, and obtain priority over the liens of these materialmen? The court below in his opinion held otherwise.

It was said that no equity arises in favor of these materialmen because it makes no practical difference to them that the mortgage is held as security for money advanced by the bank, instead of being held by others for money advanced by them. This proposition is not sound. If the mortgage had been floated, the lienors themselves would have been paid

in part or in whole. In such event they would have received the benefit of the money directly. It will be remembered that there was little or nothing due the bank when the assignment was made to it. The builders' materials were partly furnished. Would the bank be permitted, after the failure of its scheme, to take this mortgage and claim such a preference over these lienors?

Will not the court decree that the mortgage, having been made to procure a fund for their benefit, can not now be diverted by the bank so as to give it a preference and that the fund, not having been procured so that the money can be so applied, the mortgage, if valid for any purpose in the hands of the bank, will be assigned to a position of inferiority to the claims of these lienors. We think this is equity and justice.

FOR THE BANK TO HOLD THE SIMPSON MORTGAGE AND ENFORCE IT BY VIRTUE OF THE ASSIGNMENT, AS COLLATERAL SECURITY FOR A PRE-EXISTING DEBT, IS CONTRARY TO THE PROVISIONS OF THE CONSTITUTION OF THE STATE OF WASHINGTON.

The Constitution of the State of Washington provides . . . "Nor shall any corporation issue any bond or other obligation for the payment of money except for money or property received or labor done. All fictitious increase of stock or indebtedness shall be void." (Const. Washington, Art. 12, Par. 6).

It is generally held by the courts that provisions in the Constitution, similar to the one referred to above, should be strictly construed, according to the purpose and design of the framers of the Constitution. Accordingly, it is said by the courts that the pledge by a corporation of its obligations to pay a pre-existing debt is void, because it is in conflict with this provision. The courts say that the purpose of the provision was to prohibit a fictitious increase of its indebtedness; that it was to prevent an increase of indebtedness without any *present* consideration being paid therefor.

In the case of *Farmers Loan & Trust Co. v. San Diego St. Car Co.*, 45 Fed. 518, the bonds of the railroad were authorized for a specific purpose. They were issued but never sold for this purpose, and afterwards they were pledged to secure an antecedent indebtedness. Under the provisions of the Constitution of California, similar to the one in the Washington Constitution, it was held that this pledge was void and that the bonds could not be held for the purpose for which they were pledged.

The court used this language:

"This constitutional and statutory inhibition is plain, and has but one meaning: the money paid, labor done, or property actually received must be paid, performed, or received, as the case may be, on account of the issuance of the bonds; and any bonds issued contrary to this provision are, of course, illegally issued. The provision does not mean, and

cannot be held to mean, that such bonds may be issued as collateral security for any sort of pre-existing indebtedness."

The opinion was delivered by Judge Ross.

In the case of *Kemmerrer et al. vs. St. Louis Blast Furnace Co. et al.*, 212 Fed. 63, the language of the Constitution, under consideration, was practically the same as that of the Constitution of the State of Washington. The same conclusion was reached in that case. In it the court cited with approval the decision in the *Farmres Trust Company* case, above referred to.

It contains a review and a critical consideration of all the cases bearing on this question, and, after making a careful analysis of the cases, the court said:

"We have examined all the cases cited by counsel and have examined all others which we have been able to find; and, with the exception of *Nelson v. Hubbard, supra*, we find the whole trend of authorities supports the proposition that there must be a present consideration, in order to satisfy the demand of such constitutional and statutory provisions as are herein involved. Any other construction simply fritters away the safeguards which the Legislature sought to throw around the creation of corporate indebtedness."

To the same effect see *Memphis R. R. Co. v. Dow*, 120 U. S. 287; 30 L. Ed. 595.

In the case of *In re Progressive Wall Paper Corp.*, 224 Fed. 143, the referee made a report holding that certain bonds or obligations which were pledged as security for a pre-existing debt were void in the hands of the pledgee. The court reversed this decision, and, while other questions were involved, it practically refused to follow the cases to which we have referred.

On appeal, the decision of the court was reversed in the case of

In re Progressive Wall Paper Corp., 229 Fed. 489.

In this case the Circuit Court of Appeals reviewed all the cases and confirmed the doctrine for which we contend, and held that the pledge of the securities was void and sustained the decision of the referee.

Under the existing circumstances we are not disposed to enter into any discussion of these cases, or the doctrine announced by them, at this time. They fully and amply sustain our position and we feel that any argument that we might make on the subject would be but a weak repetition of the arguments stated in the cases themselves. It is, therefore, we think, unnecessary for us to further discuss this question.

On pages 143-4 of his brief, appellant quotes largely from the decision in the *Progressive Wall Paper Case* in 224 F. 1434, apparently oblivious to the fact that that decision was reversed by the Circuit Court of Appeals, as shown above.

The decision was quite unsound and deserved a reversal. It seems to have largely turned on the fact that one of the endorsers on the original note was released from the new note secured by the bonds or mortgage, and that this was a *present* consideration—it proceeded on false assumption in other respects.

In respect to both of these mortgages it may be said that, as a matter of fact, the two corporations, the bank and the building company, were the same; the building company was the mere agent of the bank, created for the purpose of effectuating a purpose in violation of the banking laws of the State of Washington.

In effect, when the bank sold the property to the building company it was a sale to itself, and when it took the assignment of the Simpson mortgage it was in effect taking a mortgage of its own property. When the Supervisor of Banking bought the \$70,000 mortgage, he was in fact buying a mortgage which was in fact the debt of his principal and a mortgage which was on the estate which in fact still belonged to it. Under these circumstances, we think, the Bank Supervisor could not hold either of these mortgages.

On the question of the identity of the corporations, we desire to refer the court to the argument of Messrs. Stiles & Latcham in the brief filed by them on behalf of Ben Olson, appellant, which is an able and exhaustive argument on the subject. We desire

to adopt the argument of these appellants on this question.

PURCHASE MONEY LIEN.

On page 157 of appellant's brief he apparently contends that the bank was entitled to a lien for the purchase money of the property and that the commissioner of banking is entitled to enforce it in this suit.

There was no express lien for the purchase money reserved in the deed or in any other writing. There was no agreement to this effect. The lots were to be paid for by bonds to be issued under the \$750,000 mortgage, which was to be given at some later date. It is well established in the State of Washington that a purchase money lien cannot arise in this way.

Smith vs. Allen, 18 Wash. 1;

Hill Estate vs. Whittlesey, 21 Wash. 142.

In the first case above mentioned the court points out the history of the doctrine with reference to purchase money liens in England and declares that this doctrine does not prevail in this state. The language of the court settles the question in the State of Washington. It is pointed out in this decision that the doctrine of the vendor's lien has never been affirmed by the Supreme Court of the United States except where it is established by the local law.

See *Bailey vs. Greenleaf*, 7 Wheat. 46;

Ahrend vs. Odiorne, 118 Mass. 261, S. C. 19
Am. Reports 449.

The agreement for the giving of the bonds under the \$750,000 mortgage was not signed by the parties and was not recorded, and it is not contended that any of the parties to this suit had notice of it. It was a secret lien in conflict with the registry laws of the State of Washington.

2 Rem. Bal. Code, 874-5-6;

Bell vs. Swalwell, 20 Wash. 602-4.

It is expressly laid down that the taking of a mortgage as security for the unpaid purchase money waives the vendor's lien.

2 Jones on Liens, 3rd Edition 1086-7 (Cases cited);

Hunt vs. Waterman, 12 Cal. 801;

Avery vs. Clark, 25 Cal. 919;

Mason vs. Daily, 44 Atl. 839;

Ledos vs. Kupfrier, 28 N. J. Eq. 161;

Robbins vs. Mastella, 46 N. E. 330;

Blomstrong vs. Due, 51 N. E. 755.

If the mortgage securing the purchase money is not given at the time of the conveyance but is subsequently given, yet intervening liens will attach and have priority.

See 25 Cyc. 250 for a full discussion of the question.

Osborne vs. Barnes, 61 N. E. 276;

Saunders vs. Penny, 35 N. E. 111, S. C. 39

Am. St. Reports, 456;

Ansley vs. Pasahro, 35 N. W. 885.

The bank is estopped from claiming the right of a preferred lien under its agreement, by reason of certain considerations of equity. At the time the land was sold to the building company, this company, with the knowledge, consent and connivance of the bank, entered into building contracts for the construction of a building on the premises, and the lienors, claiming liens in this suit, proceeded to furnish labor and materials for the erection thereof. The bank encouraged and promoted the furnishing of the materials and labor, although it was well aware of the fact that the mortgage had not been executed or recorded. It gave no notice to anyone that it claimed a lien for the purchase money, nor did it give any notice of the agreement with respect thereto. The bank not only encouraged the construction of the building, but its president demanded that the contractors and others waive their right of lien and promised that mortgages, which could not be placed if there were liens on the property, would produce the money needed to pay all liabilities to them. Having thus remained quiet, and encouraged and permitted defendants to expend their labor and material in the construction of the building, it is now estopped from claiming any priority on account of the executory agreement for the mortgage.

This question is practically settled by our own Supreme Court.

Bell vs. Swalwell Land, etc., Co., 20 Wash 602.

The court said that the purchase money lien was

a secret one, and that the liens would take precedence over it because it had not been recorded.

We think that the judgment of the court below was right in every respect, and that neither of the mortgages or the purchase money lien is entitled to recognition in a court of equity.

Respectfully submitted,

R. S. HOLT,

FITCH & ARNTSON,

Counsel for Far West Clay Company, Savage Scofield Company and other Appellees.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

McCLINTIC-MARSHALL Co., a corporation, E. E. DAVIS
& Co., a corporation, and FAR WEST CLAY COM-
PANY, a corporation,

Cross-Appellants,

vs.

ANN DAVIS and R. T. DAVIS, as executors of the
Estate of R. T. DAVIS, Deceased, R. T. DAVIS
and others, co-partners doing business under
the name and style of TACOMA MILLWORK SUP-
PLY COMPANY,

Appellees.

*Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division*

Brief of Cross-Appellants

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and R. S. HOLT,

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JAMES W. REYNOLDS,
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*Upon Appeal from the United States District Court
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Brief of Cross-Appellants

STATEMENT.

This is a cross-appeal by the above named ap-
pellants from that part of the decree rendered and
entered in the United States District Court for the
Western District of Washington, Southern Division,
on the 2nd day of May, 1922, in a suit brought by
McClintic-Marshall Co., plaintiff, against the Scan-
dinavian-American Building Co., a corporation, Ann

Davis and R. T. Davis, Jr., as executors, R. T. Davis and others as Tacoma Millwork Supply Company and a number of other lien claimants, defendants, seeking to recover mechanic's liens upon a certain building under construction in the City of Tacoma.

A consolidated record involving a number of appeals from this decree is on file herein under the title of *Forbes P. Haskell as receiver of Scandinavian-American Building Co., et al, appellants, vs. McClintic-Marshall Co., et al, appellees*, etc. Cause No. 3953, to which record reference is herein made.

By the terms of this decree, McClintic-Marshall Co. was given a judgment in the sum of \$174,000 and more with interest and costs and a material man's lien to secure the same upon the real property involved, (Record, page 507); the Far West Clay Company was given a judgment and lien upon said real property for material furnished in the sum of \$22,000 and over, with interest and costs, (Record, page 500); E. E. Davis & Co. was given a contractor's lien upon said real property for doing the steel construction in the sum of \$30,000 and over, (Record, page 511); and The Tacoma Millwork Supply Company, Appellees herein, were given a personal judgment against the Scandinavian-American Building Company for damages in breach of

contract for furnishing material in the sum of \$52,000 and over, with interest and certain costs and denied a lien for this judgment and was given a material man's lien in the sum of \$4,657.50, plus attorney's fees, interest and costs.

By this same decree many other lien claims were determined, some allowed, some rejected, and personal judgments rendered. It is from the portion of the above decree giving the Tacoma Millwork Supply Company a mechanic's lien for this amount of \$4,657.50 and costs, or allowing it a mechanic's lien upon the property in any amount, that this appeal is taken, as prejudicing the lien rights under said decree of two of the cross-appellants as of co-ordinate rank and of the E. E. Davis & Co., the contractor, of subordinate rank to the Appellees, substantially upon the ground as will be more specifically pointed out in the assignment of errors, that the several contracts under which the Appellees claimed, contained an express waiver of mechanic's lien, that the appellees had never rescinded the contracts, but were suing on the contracts, and claiming a profit under the contracts and consequently could not repudiate the lien waiver and recover on the contracts, or, having clung to the contracts throughout, could not recover on a *quantum meruit*.

The Appellees upon their first appearance by answer and cross-complaint January 19, 1921 (Record, pages 166 to 179) claim that "they entered into written contracts with defendant, Scandinavian-American Building Co., true copies of which are hereto attached and marked Exhibits A, B and C," exhibit A comprising contract for the delivery of general mill work for the building to be erected upon the property hereinbefore described; exhibit B comprising a contract for the mill work with respect to bank fixtures, and exhibit C having reference to the erection of the mill work hereinbefore referred to as distinguished from its manufacture (page 171, paragraph 12). "That thereafter and in accordance with the terms of said main or manufacturing contract, namely, exhibit A, and said bank fixtures contract, namely, exhibit B, your cross-appellants, upon the 28th day of February, 1920, and January 17, 1921, manufactured and delivered to said Scandinavian-American Building Company, a total of manufactured material especially designed for the building to be erected and being erected upon the premises hereinbefore described and not otherwise useable, a total in value of \$44,548.41, being the *reasonable and agreed value* of said goods.

“That your cross-complainants are and were at all times ready to fully complete said contract and that a reasonable profit on the remaining portion of contracts A and B is and would be \$3,000 * * * ”

Then follow allegations of the filing of Appellees' liens.

(XVI, page 173). “That the contract, exhibit C, being a contract for the erection of the two several characters of millwork hereinbefore referred to as being manufactured under exhibits A and B attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts by these, your cross-complainants, *and formed and is a part of the consideration entering into the two remaining contracts and also are one and the same transaction, each contract being a consideration for the entry into the other,* (wherever italics appear in this brief they are our own) and that a reasonable *profit* to be derived out of said contract known as exhibit C hereto attached, being the erection contract, would be and is the sum of \$10,500 * * * .” Then follow allegations of lien filed for this amount.

In their prayer Appellees ask the following, (Record, page 176): “That your cross-complainants may have a judgment against the defendant, Scandinavian-American Building Company, for the sum of \$44,548.41, plus \$3,000” (which latter was a profit) “with interest thereon at the rate of six per cent per annum from date hereof; for the sum of \$10,500 with interest at seven per cent,” and for an attorney's fee and that the plaintiff might be

adjudged to have a lien upon the premises for the total amount of the claim, \$48,048.41, with interest and attorneys' fees, (page 177).

At pages 190 to 191 is the contract set out by Appellees for furnishing the millwork of this building at an agreed price of \$65,000, in which contract appears the following, (Article XIV, page 197):

“And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all claims against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.”

Exhibit C, the contract for installing the manufactured material, is shown at pages 201 to 209, which was to furnish “All of the interior millwork to be erected complete, according to the plans and specifications, for the sum of \$30,000. Also to furnish complete the bucks as per details for the sum of \$1,266.00, all according to estimates furnished by the party of the second part, etc.” This contract contains the same section XIV, waiving lien right, (page 208). The appellees on the 7th day of April, 1921, filed an amended answer and supplemental cross-complaint shown on pages 213 to 241, wherein they again refer to contracts A, B and C and claim as follows, (page 218, par. XIII): “That thereafter and in accordance with the terms of said main or manufacturing contract, namely, exhibit A, and said bank fixtures contract, namely, exhibit B, your

cross-complainants between the 28th day of February, 1920, and January 17, 1921, manufactured and delivered to the Scandinavian-American Building Company, a total of manufactured material especially designed for the building to be erected and being erected upon the premises hereinbefore described, and not otherwise useable, and said value being \$60,512.92, being the reasonable and agreed value of said goods.

“That your cross-complainants are and were at all times ready to fully complete said contract and that a reasonable profit on the remaining portion of contract A and B is and would be \$1,000.00. Then follows an allegation of their having filed an amended lien covering this on April 7, 1921.

(Paragraph XVI, page 221): “That the contract, exhibit C, being the contract for the erection of the two several characters of millwork hereinbefore referred to as being manufactured under exhibits A and B attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts by these, your cross-complainants, and form and is a part of the consideration entering into the two remaining contracts, and was all one and the same transaction, each contract being a consideration for the entry into the other, and that a reasonable profit still to be derived out of said contract known as exhibit C hereto attached, being the erection contract, would be and is the sum of \$6,000, etc.” (setting out the filing of an amended lien for this claim as of April 7, 1921).

At page ²22 is set forth the following: “That in addition to the foregoing, your cross-complainants, under the terms and conditions of the contracts herein set forth, and pursuant to the usual method

of handling said work, did a great deal of work upon said manufactured products by way of assembling the various parts, which work is of the reasonable value of \$6,043.00," and that the cross-complainants had filed on the 7th day of April, 1921, an amended lien covering their entire claims on all these contracts.

Attached to this supplemental cross-bill as exhibit A-1 (pages 236 to 238) is a schedule of material manufactured under contract A showing the cost price of this material as far as completed only, aggregating the sum of \$58,555.92.

At page 239 is exhibit B, showing the contract for door bucks at the agreed price of \$1266.00.

Also upon the same page and the next succeeding one is exhibit C-1, showing the material manufactured for the banking room frames at the agreed price of \$1957.00.

On page 241 is exhibit G-1, which is a summary of the claims of the cross-complainants under all the contracts, showing the following footings:

Balance due.....	\$62,507.83
Profit entitled to on balance of labor contract.....	6,000.00
Profit entitled to on balance of main contract.....	1,000.00
	<hr/>
	\$62,507.83

Evidently this total is an error and should be \$69,507.83.

At pages 779 to 786 of the record appear as introduced by the Appellees, the original notices of lien filed by them in January, 1921, and the amended lien filed in April, 1921, wherefrom it appears that they are still claiming under the contracts and for profits at the contract price.

The following occurred during the production of proofs by the Appellees, (page 669):

Question (By Mr. Flick, Counsel for Appellees): "Well, will you tell his Honor, please, Mr. Davis, the character of the work, just briefly, the special character that went into this building."

(Mr. Oakley, Counsel for the Receiver): "At this time the Receiver objects to the introduction of any testimony tending to sustain a lien claim in this action for the reason that in each of these three contracts the following provision is set forth: 'Article XIV. And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all rights to any mechanic's claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.'

"That provision is found in each of the three contracts, and for that reason we maintain that the parties are estopped from proceeding to claim or attempting to claim any liens."

The Court: "I will have to hear the evidence

before I would know what the ruling would be, so that I will hold the objection as premature and will overrule it."

Mr. Oakley: "I am raising the question at this point as I do not wish to waive any rights." (Note an exception to the ruling of the court).

The Court: "Allowed." (page 670).

Mr. Holt: "Let it be understood that objections made by Mr. Oakley are made in behalf of all the other defending attorneys and will be so considered."

The Court: "All objections will be made in behalf of all claimants unless otherwise stated or indicated." (page 671).

"Referring to exhibit 154 the amounts set opposite each one of the separate lines represent the reasonable value of the material and labor entering into that material (S. F. p. 380).

"That portion designated on exhibit 154 as exhibit A-1 and exhibit B-1, that is the door buck contract and is incorporated in one of these contracts (S. F. p. 380). The next sheet is C-1 and that represents the bank quarters, which is a separate contract and amounts to \$1759.00, the reasonable value for the material."

Mr. Oakley objects on the ground that these cross-complainants are relying on the contract and that reasonable prices did not prevail.

Mr. Flick: "We are not relying on the contract, Mr. Oakley."

The Court: "Objection was overruled."

(Page 693) Mr. Flick: "The last page of exhibit 154 details the various contracts and the profit claimed under those contracts, such as the door buck contract, the erection and labor contract, the open

contract and bonds, and the profit on erection * * *” (S. F. p. 426).

Exhibit 154 referred to by Mr. Flick will be found at pages 766 to 771 of the record and G-1, the final summary at page 773, from which it appears that Appellees are still claiming for the contract and the profit solely under three of the contracts and both a reasonable value and a profit at the contract price under contract A.

In the argument of Appellees Counsel before the trial court he contended—(We quote from Mr. Flick’s Brief under stipulation of Counsel permitting such reference, Record, p. 434).

Says Mr. Flick: “We therefore respectfully submit to your Honor that a total profit \$12,843.10 would not be out of the way, but in truth they are only asking \$11,300.”

Again: “The exhibits clearly portray the prices which, as the Evidence shows are practically the correct price. The Exhibits also show the anticipated profits, so that there is now nothing to be added, if your Honor please, to the pleadings or to the exhibits mathematically portraying this lienor’s claim, nor in fact is anything lacking in proof.” And again: “If Mr. Metzger” (opposing Counsel) “says that we are suing on contract, and cannot do this, we can answer him that the reasonable price and reasonable profits are stated. If he says that we are not in a position to sue for reasonable value because we have used the term ‘contract’ in the evidence, and have asked for profits, we can say to

lants, McClintic-Marshall Company, Far West Clay Company and E. E. Davis & Company, have instituted this cross-appeal and made and filed herein the following assignments of error (Record, page, 29)):

ASSIGNMENTS OF ERROR.

1. "The court erred in holding that the defendants (Ann Davis and others) co-partners doing business under the name and style of Tacoma Millwork Supply Company, have a valid and subsisting material man's lien upon the real estate and premises described in Paragraph III of said decree, or any paragraph thereof, for the reason that said parties, by their original and amended complaint in intervention and by their other pleadings and by the evidence submitted in support thereof, elected to and did affirm the contract entered into between them and the Scandinavian-American Building Company, and did thereby affirm each and every part of said contract, including the 14th paragraph thereof by the terms of which they expressly waived any and all right of lien whatsoever."

2. This is substantially the same as Number 1.

3. "The court erred in allowing said parties doing business as Tacoma Millwork Supply Company a material man's lien upon the real estate and premises described in paragraph III of the decree, for the reasons that the said claim of lien was based upon a series of contracts constituting a single transaction and one general undertaking, whereunder said parties became and were contractors for the furnishing and installing of certain materials, and that if entitled to any lien at all, said lien should only be of the rank of a contractor's lien."

ARGUMENT AND POINTS OF LAW.

I.

It is our contention that the Appellees were irrevocably bound by their waiver of lien right; and that it was error on the part of the court to allow them a mechanic's lien upon the property in question in any amount whatever.

We are not directly concerned with the personal judgment which the court allowed them against the Scandinavian-American Building Company, but being ourselves lienors, two of us material men of co-ordinate rank with the lien given the Appellees, and one, E. E. Davis & Company, a contractor, a sub-ordinate lienor; for the only recovery will be out of the property and every dollar that goes to the Appellees of such security, proportionately lessens the satisfaction of our claims.

The waiver of lien was express and unequivocal in each one of the various contracts of the Appellees with the Building Company. By the terms of these contracts and by the express statement of the Appellees in their original cross-bill and in their supplemental cross-bill, and by the express terms of each contract, each contract as to all of its parts was itself entire and inseparable. The contracts were

all made and expressly so declared to be by Appellee contemporaneously, as a part of one transaction, and indivisible.

The Appellees sought to avoid the results of this waiver by claiming that they were induced to consent to it by the fraud of the owner of the premises, the other party to their contract, which fraud they did not discover until January, 1922.

We contend then that the Appellees upon the discovery of the fraud were put to the election of either suing upon the contract in damages for the breach thereof, or rescinding the contract entirely, notifying the other party thereof, and suing upon a *quantum meruit*. They could not do both.

But it is apparent from the foregoing statement of the case that the Appellees did nothing of the kind. They attempted to grasp both horns of the dilemma in their pleadings, in their proofs and finally upon the argument on the final submission of the case.

It is true that counsel for Appellees herein when entering its proofs, on being challenged by the Appellants, claimed that it was not relying upon the contract, and submitted proofs of the reasonable value of materials claimed to have been furnished

under the main contract A. Yet, by the form of his pleadings and in the schedules introduced in evidence, he was at all times seeking to recover profits on his contracts at the contract price. (Appellees' Exhibit, record pp. 766 to 773).

Referring to the Record, page 773, is the final summary by Appellees of their claim. Exhibit A was the main contract for manufacturing certain millwork material, on which they claim \$58,000 and over, as to which there was some evidence introduced as to its reasonable value. Exhibit B was the contract for certain door bucks for which they claim the sum of \$1266.00, this was the exact and entire contract price. Exhibit C was another contract for bank room fixtures for which they claim the entire and exact contract price, \$1957.00. Exhibit D was a profit, pure and simple, and so claimed on the \$30,000 contract for installing the manufactured material in the building.

Now, each one of these separate contracts was made, by the terms of each contract, and the pleadings and claims of the Appellees just as interdependent as the various paragraphs or provisions of any one contract, upon the other paragraphs and provisions thereof (See cross-complaint of Tacoma Millwork Supply Co., page 210).

(Record, page 173 XVI): "That the contract, Exhibit C, being a contract for the erection of the two several characters of millwork hereinbefore referred to as being manufactured under exhibits A and B attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts by these, your cross-complainants, and formed and is a part of the consideration entering into the two remaining contracts and was all one and the same transaction, each contract being a consideration for the entry into the other, * * * " The same is repeated in the supplemental cross-bill of the Appellees (Record, page 221). How can it be said then, that the Appellees claiming thus ambiguously on contract A at times as under the contract and at other times as not under the contract, yet claiming distinctly and unequivocally under each of the other three contracts, and a profit thereon at the contract price, have rescinded the contract so as to escape the effect of the lien right waiver?

II.

The right to claim a lien was expressly waived.
(See Article XIV of all contracts; Tr. p. 753).

III.

Such waiver is valid.

Holmes vs. C. M. & P. S. Ry. Co., 59 Wash. 293.

Grey vs. Hickey, 94 Wash. 370, at p. 374.

Pacific Lbr. & Tbr. Co. vs. Bailey, 60 Wash. 566, at p. 569.

Seattle Lbr. Co. vs. Cutler, 63 Wash. 662, at p. 665.

Davis vs. LaCrosse Hospital Ass'n., 99 Wash. 351.

Baldwin Locomotive Works vs. Hines Lbr. Co., 125 N. E. 400, 13 A. L. R. 1059 at pp. 1061 to 1062.

Kelly vs. Johnson, 95 N. E. 1068, 36 L. R. A. N. S. 573.

27 *Cyc*, p. 261, *et seq.*

18 *R. C. L.*, Mechanics Lien, sec. 104.

IV.

The waiver was supported by adequate consideration.

27 *Cyc*, 263, *et seq.*

18 *R. C. L.*, Mechanics Liens, sec. 104, *et seq.*

Grey vs. Jones, 81 Pac. 813, at p. 814
(Opinion by Judge Bean).

Hughes vs. Lansing, 55 Pac. 95.
(Opinion by Judge Wolverton).

Annotation in 13 A. L. R. at p. 1065.

V.

The waiver cannot be avoided by rescision of Article XIV alone.

(a) The contracts are entire and each is expressed to be “not severable or divisible.” (See Article I of Contracts, Tr. p. 747).

(b) There can be no partial rescision.

The rule denying partial rescision can hardly be gainsaid. It is in effect admitted, since counsel for these appellants^{ees} said in the brief submitted to the trial court, “We are familiar with the principle that one cannot ordinarily rescind any part and still get the benefit of the contract.”

“Partial rescision. A rescision must be in *toto*. A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other, unless the two parts of the contract are so severable from each other as to form two independent contracts.”

13 C. J. Contracts, Sec. 682, p. 623.

“It is plain that if a party to a contract seeks to avoid it by reason of the fraud or failure of the other party to comply with its terms, he cannot rescind it as to some of its provisions and rely upon it as to others. In order that this lien may be maintained it must appear that the petitioner has substantially performed his part of the contract, and *it must*

further appear that there is nothing in the contract itself which will prevent the establishment of the lien. (Italics ours) * * * If he (the petitioner) was induced to make the contract by reason of the fraudulent representations of Jaspar, on discovery thereof he could have rescinded it as a whole, and have brought an action at law for its breach, or he might have brought an action declaring upon a *quantum meruit* for the value of the labor and material furnished, or he could have availed himself of the remedy provided for the enforcement of a mechanics lien to recover for the value of the labor and materials furnished."

Girouard vs. Jaspar, 106 N. E. 849 (Mass.).

"Appellants (the lien claimants) do not seek to rescind the contract in *toto* and to recover the reasonable value of their services and materials. They do not allege that they were induced by fraud, misrepresentation or mistake to accept the water rights and mortgage, in ignorance of their real character, nor do they, having failed to return the property delivered to them or to allege any reason for their failure to do so, sue for the damage resulting from the difference between that which they received and that which they contend they were entitled to. Having retained this property they must be held to have retained it in full payment of the amount due under the contract, and cannot be heard to say they accepted it in partial payment or on account. *They attempted in this action to avail themselves of the portion of the contract which fixes the amount of their compensation, any they cannot repudiate but must be held to be bound by the provisions thereof, which gave respondents an option to pay with*

water rights and a mortgage instead of money."
(Italics ours.)

Bernard vs. Fisher, 177 Pac. 762 (Idaho).

"One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract and sue for his damages; or he may rescind it and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other because a sale cannot be valid and void at the same time."

Stuart vs. Hayden, 72 Fed. 402, at p. 411.

Affirmed in 169 U. S. 1, 42 Law. Ed. 639.

"There can be no doubt that, where a contract is breached, the party injured may pursue one of two remedies: first, he may sue upon his contract and recover his loss of profits; or, second, he may waive the contract and sue upon a *quantum meruit*; but he cannot pursue both remedies, for they bear a different measure of damages. *Gabrielson vs. Hague Box & Lbr. Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032. This is no doubt, the general rule."

Grey vs. Hickey, 97 Wash. 278, at 279, 166 Pac. 625.

"When conditions arise which authorize a party to rescind a contract, himself electing whether he will rescind or whether he will pursue his remedies under the contract, since he cannot do both, the remedies being inconsistent;

and the pursuit of either of these remedies is an election which prevents resort to the other.”

20 C. J. 6

J. L. Owens Co. vs. Doughty, 110 N. W. 78 (N. D.).

Guild vs. Moore, 155 N. W. 44, at p. 49 (N. D.).

Sherbloom vs. Faussett, 174 Pac. 337 (Wash.)

National Bank vs. Powles, 33 Wash. 21, at pp. 27 and 28.

Cole vs. Smith, 58 Pac. 1086 (Colo.).

Federal Life Ins. Co. vs. Maxam, 117 N. E. 801 (Indiana).

Collinson vs. Ream, 144 N. W. 1050.

Cheney vs. Bierkamp, 145 Pac. 691, at 692 (Colo.).

Walker vs. McMillan, 160 Pac. 1062.

VI.

If a Reformation of these contracts is contended for by Appellees, we have no hesitancy in asserting that there is no ground either in the pleadings or in the proof for such relief. The pleadings count on the contracts and set them out. They allege that these contracts were induced by fraud, but do not claim that the agreements the appellants intended to make were other or different from those actually entered into, and naturally they do not set

out the agreements intended to be made.

“In order to make out a good cause of action (for reformation of an instrument) the bill of complaint or petition should show every element necessary to entitle the complainant to equitable relief, with especial reference to the following: (1) The grounds of reformation; (2) the agreement actually made; and (3) the agreement which the parties intended to make.
* * *

Reformation at the instance of a defendant should be made by alleging the mistake and asking affirmative relief by a cross bill, cross petition, or counter claim, and in such pleading the same rules as to the sufficiency of allegations apply as in the case of a bill or complaint. Relief cannot be had, however, without setting up facts upon which the equitable jurisdiction depends.”

34 Cyc, Reformation of Instruments, pp. 971 and 977.

“It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party, and fraud or inequitable conduct of the other.”

Story's Equity Jurisprudence, 14th Ed. vol. 2, sec. 980.

“If a party demands equitable relief he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction.”

Buchanan vs. Harrington, 53 S. E. 478, at 479 (N. C.).

Williston Contracts, Vol. 4, Sec. 1525, p. 2714.

There is no claim in the pleadings that the

writing fails to embody the real agreement, and when it comes to the matter of proof appellants^{ees} are met, first, by the fact that they expressly disclaimed any attempt at reformation (Tr. p. 694), and, second, by the fact that it is perfectly clear from the evidence that when the formal written contracts were submitted by the Building Company for execution these contracts were examined in detail, every provision was read and their contents fully known. Thereafter the contracts were executed in the shape in which they now appear in evidence as Exhibits 151, 152 and 153. Any claim that they were signed in ignorance of their true terms or by mistake is utterly vain. (See Tr. pp. 707, 714, 693, 695, 696, 698 and 699). The fraud, if fraud there was, was not in the execution of the contract with the Millwork Supply Company, but in the consideration for it, and hence is not such fraud as will give rise to a right of reformation.

“Fraud to be the basis of reformation of contract must be fraud in the execution thereof.”

34 Cyc, Reformation of Instruments, 921.

“The grounds for reformation are mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, and to constitute a good cause of action the grounds upon which it is based must be alleged.”

34 Cyc, Reformation of Instruments, 974.

“The equitable doctrine of reformation of written instruments is usually applied where there has been a mutual mistake on the part of both parties to the contract, or else where there has been a mistake on the part of one of the parties and fraud in the other.”

Story's Equity Juris., 14th Ed., vol. 2, sec. 978.

“Where a writing owing to the fraud of one of the parties and mistake of the other, fails to express the agreement at which they arrived, reformation will be allowed.”

Williston Contracts, vol. 3, p. 2714.

“The party alleging the mistake must show exactly in what it consists and the correction that should have been made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. *Beaumont vs. Bramley*, 1 Turn. & Rus., 41; *Breadalbane vs. Chandos*, 2 Myl. & C., 711; *Fowler vs. Fowler*, 4 De Gex & J., 255; *Sells vs. Sells*, 1 Drew. & Sm., 42; *Lloyd vs. Cocker*, 19 Beav. 144. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. *Rooke vs. Kensington*, 2 K. & J., 753; *Eaton vs. Bennett*, 34 Beav., 196. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. *Mortimer vs. Shortall*, 2 Dr. & War., 372; *Sells vs. Sells*, *supra*.”

Hearne vs. N. E. Mutual Marine Ins. Co., 87 U. S. 490, 22 L. Ed. 397.

“The jurisdiction of equity to reform written instruments, where there is a mutual mistake or mistake on one side, and fraud or unequitable conduct on the other, is undoubted;

but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court. *Fishback vs. Ball*, 34 W. Va. 644; *Shenandoah Valley R. Co. vs. Dunlop*, 86 Va. 346."

Simmons Creek Coal Co. vs. Doran, 142 U. S. 417, at 435; 35 L. Ed. 1063, at 1071.

"Reformation of a contract will not be granted by a court of equity unless there has been a mistake which is mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescission, but not for reforming a contract. Where there has been a mistake of one party, accompanied by fraud or inequitable conduct of the remaining parties, in such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties."

Grieb vs. Equit. Life Assurance Soc., 189 Fed. 498 at 501.

In *Long vs. Abstract Co.*, 158 S. W. 305, the court declared the following doctrine axiomatic, namely:

"That a court of equity will construe and reform a contract so as to express the real intention of the parties thereto, or annul and cancel the same, where it is illegal and void for any reason; yet it will not make a contract for the parties thereto or reform the same except for the purpose of expressing the real intention of the parties."

And in the further course of the opinion said:

“In the first place fraud is not a ground for reforming a deed of trust, or any other contract for that matter, that I ever heard of. Fraud is a well known ground for the cancellation of a contract, but not for its reformation.” (Opinion at p. 308).

Reformation is therefore unavailing to these appellants.

VII.

Under the statutes of the State of Washington and the rulings of its Supreme Court, the appellees were contractors, and not material men, and if entitled to any lien at all, were to be ranked as “contractors” and not as “material men.”

Young Men's Christian Association vs. Gibson, 58 Wash. 307;

Architectural Decorating Co. vs. Nichlason, 66 Wash. 198;

Chavelle vs. Island Gun Club, 77 Wash. 304, p. 310.

“In every case in which different liens are claimed against the same property the court in the judgment must declare the rank of such lien or class of liens which shall be in the following order;—1, all persons performing labor; 2, all persons furnishing material; 3, sub-contractor; 4, the original contractor; and the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank;
* * * ”

Remington's 1915 Codes & Stat. of Wash., Sec. 1141;

Remington's 1920 Compiled Stats. of Wash.,
Sec. 1141.

It may be of interest as additional evidence that the questions here urged were raised upon the trial below, to call the court's attention to the record, pages 428 to 434, where it is stipulated (P. 428): "Paragraph II. That this stipulation shall be treated as a pleading by each of the parties hereto in answer or reply to the answer and cross-complaint or answer and counter-claim of each of the other parties hereto, denying the right of each and denying the priority of the lien of each and every one of them, and assuring the priority of the lien of such party hereto over each, any, or all of the liens of the other parties hereto. * * * *'" (See also Paragraph III, pages 429 and 430.)

VIII.

Referring again to the trial brief of the Appellees filed in the case and to page 8 thereof, we find in part the following:

**"SUIT ON CONTRACT OR QUANTUM
MERUIT OR FOR FORECLOSURE OF
LIEN—REFORMATION.**

Mr. Metzger (Counsel for these Appellants)
~~suggests that we are suing on contract and that~~
such suit we are adopting the terms of the contract

and necessarily adopting or re-adopting the waiver of lien," etc.

(For right to refer to briefs, see Stipulation Record, page 434.)

We apologize for the illogical setting of this point, but this brief is in the hands of the printer for final printing, and time does not permit a rearrangement.

For the foregoing reasons, we respectfully submit that the decree of the trial court in awarding the Tacoma Millwork Supply Company a lien upon the real property in question in the sum of \$4657.50, and \$500.00 attorney's fees and interest \$360.22 was erroneous, should be reversed and no lien allowed this party whatever—and secondly, if this amount is allowed to stand as a lien, that claimants should be ranked in the class of "contractors" and not of "material men."

Respectfully submitted,

HAYDEN, LANGHORNE & METZGER,
R. S. HOLT,
JAMES W. REYNOLDS,
PETERS & POWELL,

Solicitors for Cross-Appellants.

No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TACOMA MILLWORK SUPPLY COMPANY,
a partnership consisting of ANN
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Deceased, R. T. DAVIS, JR., LLOYD
DAVIS, HARRY L. DAVIS, GEORGE L.
DAVIS, MAUDE A. DAVIS, MARIE A.
DAVIS, RUTH G. DAVIS, HATTIE
DAVIS TENNANT, and ANN DAVIS,

Appellants,

VS.

McCLINTIC-MARSHALL COMPANY,
et al,

Appellees.

ANSWERING BRIEF OF McCLINTIC-MARSHALL COMPANY

ELMER M. HAYDEN,
MAURICE A. LANGHORNE,
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*Solicitors for McClintic-
Marshall Co.*

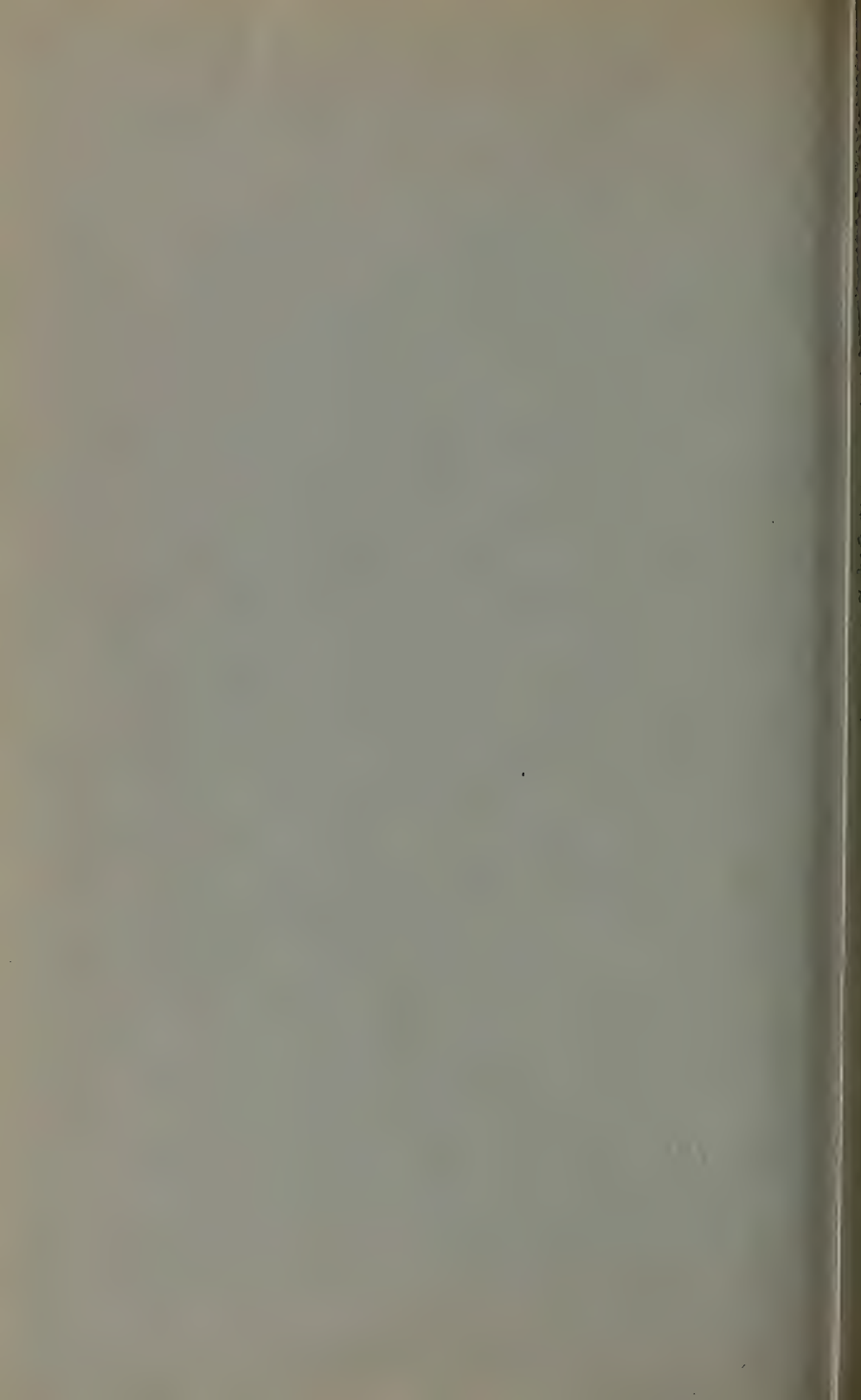
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523-30 Tacoma Bldg.,
Tacoma, Wash.

Filed this day of March, 1923

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.



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Appellants,

VS.

McCLINTIC-MARSHALL COMPANY,
et al,

Appellees.

ANSWERING BRIEF OF McCLINTIC-MARSHALL COMPANY

STATEMENT OF THE CASE

On February 28, 1920, the appellants, doing business as and hereinafter referred to as the Tacoma Millwork Supply Company, entered into three written contracts with the Scandinavian-American Building Company for the furnishing and installing of certain material in the new

building to be erected by the Building Company, in Tacoma, Washington.

One contract, Exhibit "A" to the answer of these appellants (Tr. pp. 190, *et seq*, and in evidence as Exhibit 151, Tr. p. 746) covered the interior millwork for this building, with the exception of the banking quarters on the ground floor. This contract, which during the trial was and will be hereinafter referred to as the material contract, called for the furnishing of this millwork for the lump sum of \$65,000. Another contract, Exhibit "B" to the answer (Tr. p. 180 and in evidence as Exhibit 153, Tr. p. 763) covered the furnishing and installing of the exterior window frames, and transom sash for the ground floor banking quarters, which were agreed to be furnished for the lump sum of \$1957, plus \$171 for the labor of installing the material. This contract is known as the "bank quarters contract". The third contract, Exhibit "C" to their answer (Tr. p. 200 and in evidence as Exhibit 152, Tr. p. 758) covered the erection or installation in the building of the interior millwork called for by the material contract. This installation was agreed to be done for the lump sum of \$30,000. This contract is known as the "erection contract".

These contracts resulted from certain written proposals which were submitted by these appellants and were received in evidence as parts of Exhibits 151, 152 and 153. We invite the court's

attention to the discrepancy between the original proposal for the millwork contract forming part of Exhibit 151 (Tr. p. 757), and the so-called carbon copy thereof, also received as part of said Exhibit 151 (Tr. p. 755), and suggest an examination of the original Exhibit which has been transmitted from the lower court. In this connection the court will note that the cross complaint of these appellants relies on the original proposal signed by R. T. Davis, Jr. (Cf. Tr. p. 179 with p. 757).

These contracts were all entered into on the same day, and as one transaction. Paragraph XVI of the original answer and cross complaint alleges with respect to them:

“that the contract ‘Exhibit C’, being a contract for the erection of the two several characters of millwork hereinbefore referred to, as being manufactured under Exhibits A and B, attached hereto and made a part hereof, was entered into contemporaneously with the said other or remaining contracts, by these, your cross complainants, and formed and is a part of the consideration entering into the two remaining contracts, and was all one and the same transaction, each contract being a consideration for the entry into the other.” (Tr. pp. 173, 174.)

This allegation is repeated or reiterated in paragraph XVI of the Amended or Supplemental Answer and Cross Complaint. (See Tr. p. 221.)

Each of these contracts contains the following provisions:

“Although it is distinctly understood and agreed between the parties hereto that this contract is a whole contract and not severable or divisible, yet for the convenience of the contractor it is stipulated that payments shall be made as follows:” (Cf. Tr. pp. 182, 191, 202, 747, 759, 764)

“ARTICLE V. The said contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.: All the work aforementioned to be delivered and *put in place* so that the whole can be completed in ten (10) months from date of this contract, and to be delivered as fast as the building will permit.” (Cf. Tr. pp. 183, 193, 203, 749, 759, and 764.)

In lieu of the italicized words “put in place” the word “erected” is used in the bank quarters and erection contracts.

“ARTICLE XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic’s claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.” (Cf. Tr.

pp. 187, 197, 208, 753, 758 and 763.)

“ARTICLE XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except by the mutual consent of the parties endorsed herein in writing and duly executed.” (Cf. Tr. pp. 189, 199, 754, 758, and 763.)

The work of preparing the materials for installation was undertaken at the factory of the appellants in Tacoma and when work upon the building was suspended due to the failure of the Scandinavian American Bank of Tacoma, on January 15, 1921, certain materials had been completely manufactured, ready for installation, others were partially complete, and still others had not yet been worked up. In addition certain of the materials, either wholly or partially manufactured, were stored at the appellant's factory. Others, for the appellants' convenience and to relieve the congestion at their factory, were by them stored in a down town warehouse. The relative stages of the work and the location of the material is indicated by Exhibit 154 (Tr. pp. 766, *et seq.*) Moreover certain of the work comprehended under the erection contract (Exhibit 152) which was originally intended to be done in the new building and after the delivery of the material there had been done in the appellants' factory or at its warehouse in an-

icipation of the actual work of installation. *No work of installation had been done upon the premises liened upon, and no material delivered there except 691 window openings and 80 pieces of scaffold bucks.* (Tr. pp. 684 and 768, Exhibit E-1 Tr. p. 772.)

The appellants assigned error, first, because a lien was not allowed for all material the manufacturing of which had been wholly or partially completed, and irrespective of the question of delivery to the liened premises. (See Assignment of Error No. 1, p. 564.) No further statement of the facts is necessary on this point, since by this assignment is raised the question of law whether under the lien statutes of the State of Washington delivery is essential to the validity of a claim of lien.

The second Assignment of Error (Tr. p. 565) is based upon the refusal of a lien for the value of the labor performed on defendant's premises under the erection contract in preparing manufactured material for actual erection or installation. This also presents a question of law, namely: must the labor for which a lien is claimed, be performed on the premises against which the lien is sought?

The 4th Assignment of Error (Tr. p. 565) raises the question whether delivery of manufactured materials to the down town warehouse for storage, pending the time when the building company was ready for the same, was a sufficient delivery to support the lien. We have already

asserted that such storage was for the appellant's convenience. The facts warranting that conclusion are unequivocal.

The contracts all required the work to be delivered and either put in place or erected. (See Article V of each contract). The appellant recognized that this provision required delivery.

"We did not agree to deliver any of it. The company was to accept delivery from us and it is obvious under the material contract that we did not have to put it in place. *We would deliver it to the building at the best.*" (Testimony of R. T. Davis, Tr. pp. 688, 689.) (Italics ours.)

The contracts further provided that the work was to be furnished and finished to the satisfaction, approval and acceptance of the architect, and that the owner, i.e., the Building Company, should not be in any manner "answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the contractor, used and employed in finishing and completing the same." (Cf. Articles II and XVII, of the contracts, Tr. pp. 192, 198, 747, 753.) The material was not delivered to the building,

"for the reason that there was no room for them there, and they would not permit us to put them on the building because it would

slow down the work, and for another reason if we put it on the building, there being no roof, it would be the same as putting it in the street. It would be raining, and the stuff would be ruined. " (Testimony R. T. Davis, Jr., Tr. p. 678; Cf. Tr. p. 708.)

It will be borne in mind that the contract specifically called for delivery or erection "as fast as the building will permit", and that pending acceptance by the architect any loss or damage should be borne by the contractor. The storage space at the appellants' factory proving insufficient, they recommended a warehouse down town, and on August 3, 1920, wrote the following letter relative thereto:

"We have and will keep the material in storage fully insured against fire loss, and in the event of fire loss we hereby agree to reimburse you to the full extent of your interest therein.

"Also we agree to deliver all of this material to the building site upon your order.

"We wish to state, too, that we will bear the expense of this accommodation ourselves, as it is our desire and Mr. Webber's wish that we expedite the manufacture of this material, and he acquiesced in this plan of procedure." (Tr. p. 690.)

Later, on December 27, 1920, they wrote another

letter inquiring if the building company could take delivery of part of the window frames out of storage. In that letter they said, after referring to the rental which they were paying:

“We do not mind retaining one floor for storage, and *while we realize it is a matter of merely our own concern to maintain warehouse space*, still we know you will appreciate the fact that delivery of the frames to the building has been greatly delayed through no fault of ours.” (See Exhibit No. 167, Tr. p. 774.) (Italics ours).

Moreover at all times up to the 6th or 8th of January, 1921, the Building Company refused to take delivery. (See Tr. pp. 697, 707, 711, and Exhibit 167, Tr. p. 775.) Appellants attempt to meet this situation as follows:

“We were through with the material when it was manufactured. The letter referred to by Mr. Oakley contains the following clause: ‘Owing to the great quantity of this work and our limited storage facility, it will be necessary that we ask you to provide dry storage space and accept delivery as fast as manufactured.’” (Testimony George T. Davis, Tr. p. 713, Cf. Appellants’ Brief pp. 32 and 45.)

The quotation thus made is from the carbon copy signed by Webber and forming a part of Exhibit 151. The language quoted is not to be found

in any of the formal written contracts which by their terms supercede all previous negotiations and agreements (see Article XX of these contracts, Tr. p. 199); it is not contained in the original proposal of these appellants, signed by R. T. Davis, Jr. (See Exhibit A, attached to the answer and cross complaint, Tr. p. 179, and Tr. p. 757); but strange to say is found only in what is offered as a carbon copy of Mr. Davis' letter. By reference to the original exhibit it will be seen that the copy bearing Webber's signature, while it is a carbon paper impression, is neither in form nor content a copy of R. T. Davis' letter. This carbon paper impression, signed by Webber, is stated by R. T. Davis, Jr., to be a copy of his proposal, and designated by his counsel, Mr. Flick, as a duplicate original. (See Tr. p. 666.) It is obviously neither the one nor the other. We submit that before credence is given to it, or any reliance placed on it the appellants should explain fully and clearly the discrepancies in form and matter between it and the original proposal on which their cross complaint is founded.

Each of the three formal contracts of these appellants contains an absolute waiver of any right of lien. (See Article XIV, quoted *supra*, Tr. p. 753.) The appellants seek to avoid the effect of that article of their contracts by claiming that they were induced by fraudulent representations to sign the contracts with that clause included. We

are not directly concerned with the sufficiency of the case made by them as to how they came to enter into the contracts they did. We do contend, however, that the appellants are estopped to make the claim that such waiver of lien is not binding by reason of their election to sue upon these contracts. This contention was not passed upon directly by the lower court, but since, if good, it will operate to deny any lien, and since the District Court did allow these appellants a small lien, the effect is that such contention was tacitly overruled. That the lower court erred in such action is in large part the basis of the joint appeal taken by E. E. Davis & Company, Far West Clay Company, and McClintic-Marshall Company. The pertinent facts and the law will be presented in the appellants' brief on that appeal, and no attempt will here be made to repeat them in their entirety, or exhaustively to set forth the law bearing thereon. The question has such a direct bearing upon the issues involved here, however, that we believe it can do no harm briefly to indicate what appear to be the controlling facts, and later to submit in barest outline the authorities bearing thereon.

Counsel for these appellants stated during the trial:

"We are not relying on the contract."

With all due deference we submit that that statement is belied by every other move of counsel,

and his clients, in the case, and was a policy statement not intended to bind the appellants, and therefore not entitled to any weight in the consideration of the present appeal. The original cross complaint of these appellants counted on these contracts, and sought to recover the profits which it was claimed would have been earned had the contracts been performed. (See paragraphs XII, XIII and XVI, and paragraph II of the prayer, Tr. pp. 171 to 176). These allegations were reiterated in substance in the amended answer and supplemental cross complaint. (See paragraphs XII, XIII and XVI thereof, Tr. pp. 218, 219, 221 and 222.) These appellants filed three different claims of lien. In each various items of anticipated profit are included. The one last filed (Exhibit 174, Tr. p. 785) is the one they now rely on. As to it, R. T. Davis, Jr., testified:

“The last lien filed covers the amounts claimed in the first liens.” (Tr. p. 693.)

The concluding paragraph of said lien is as follows:

“That in said balance now designated as and for material, said balance contains a profit amount of \$6,000 on the labor or erection contract, and also contains a profit amount of \$1,000 upon the main millwork contract.” (Tr. p. 786.)

As to said lien, it is alleged in paragraph XVI

of the amended answer:

"That said lien comprises a total by way of amendment inclusive of the charge herein just recited of all the labor, material and profit claimed by these cross complainants under their various contracts." (Tr. p. 222.)

R. T. Davis, Jr., also testified as follows:

"On the last sheet of Exhibit No. 154, Exhibits 'A' to 'G' inclusive, the total claim is \$68,748.33, then we gave a credit of \$6,240.50, and these items were made up about the time we filed the lien, and the balance due we claim was \$62,500, and to this we have added profit we were entitled to on the balance of the labor contract, or \$6,000, and profit that we were entitled to on the balance of the main contract and bank contract, \$1,000, making a total balance of \$69,507.83, and this includes the item of profit we would have made if the contract had been carried out." (Tr. p. 691; Cf. Tr. p. 773.)

At all times before the lower court, appellants contended that they were entitled to recover these profits, and in their briefs filed with the lower court they set out certain tabulations based, first, upon the contract price, second, upon reasonable value. In the first resume they include an item of \$649.50, designated as anticipated profits upon the material contract, and an item of \$6,000

designated as anticipated profits upon the labor contract. In the tabulation based on reasonable values, they include an item of \$1,000 designated as "profit on uncompleted portion (of material contract) asked", and an item of \$6,000, designated as "labor profit, erection contract."

In commenting up these statements, they say:

"We therefore respectfully submit to Your Honor that a total profit \$12,843.10 would not be out of the way, but in truth they are only asking \$11,300."

Again in the course of the same brief they say:

"The exhibits clearly portray the prices which, as the evidence shows, are practically the contract price. The exhibits also show the anticipated profits, so that there is nothing now to be added, if Your Honor please, to the pleadings or to the exhibits mathematically portraying this lienor's claim, nor in fact is anything lacking in proof."

and again:

"If Mr. Metzger says that we are suing on contract and cannot do this, we can answer him that the reasonable price and reasonable profits are stated. If he says that we are not in a position to sue for reasonable value because we have used the term 'contract' in the evidence,

and have asked for profits, we can say to him that Your Honor has full power to reform the instrument under the pleadings and the facts so that we may without fear of technical difficulty sue upon the contract."

(For the right thus to refer to these briefs see the stipulation appearing in the transcript at p. 434.)

And as a last point in this connection, the intent to seek reformation of these contracts was expressly denied. (Tr. p. 694.) The disguise of words is too thin to prevent it clearly appearing that throughout this case appellants have sought to benefit by these contracts and to sue upon them to the end that they might have and recover their anticipated profits, but at the same time have sought to avoid the onus of them, to-wit, the express waiver of lien, by rescinding Article XIV alone, which is inseparable and indivisible from the remainder of the contract.

POINTS AND AUTHORITIES

As to Waiver of Lien

1. *The right to claim a lien was expressly waived.* (See Article XIV of all contracts; Tr. p. 753.)

2. *Such waiver is valid.*

Holm vs. C. M. & P. S. Ry. Co., 59 Wash. 293; 109 Pac. 799;

Gray vs. Hickey, 94 Wash. 370, at p. 374;
162 Pac. 564;

Pacific Lbr. & Tbr. Co. vs. Dailey, 60 Wash.
566, at p. 569; 111 Pac. 869;

Seattle Lbr. Co. vs. Cutler, 63 Wash. 662,
at p. 665; 116 Pac. 1;

Davis vs. LaCrosse Hospital Assn., 99 N. W.
351; 1 Ann. Cas. 950 & note;

*Baldwin Locomotive Works vs. Hines Lbr.
Co.*, 125 N. E. 400, 13 A. L. R. 1059 at
pp. 1061 to 1062;

Kelly vs. Johnson, 95 N. E. 1068, 36 L. R. A.
N. S. 573;

27 Cyc., p. 261, *et seq.*;

18 R. C. L., Mechanics Lien, sec. 104.

3. *The waiver was supported by adequate consideration.*

27 Cyc., 263, *et seq.*;

18 R. C. L. Mechanics Liens, sec. 104, *et seq.*;

Grey vs. Jones, 81 Pac. 813, at p. 814,
(Opinion by Judge Bean);

Hughes vs. Lansing, 55 Pac. 95, (Opinion
by Judge Wolverton);

Annotation in 13 A. L. R. at p. 1065.

4. *The waiver cannot be avoided by rescission of Article XIV alone.*

(a) The contracts are entire and each is expressed to be "not severable or divisible". (See Article I of Contracts, Tr. p. 747, Appellant's Brief

p. 86, *et seq.*)

(b) There can be no partial rescission.

13 C. J. Contracts, sec. 682, and cases cited.
Girouard vs. Jaspar, 106 N. E. 849 (Mass);
Bernard vs. Fisher, 177 Pac. 762 (Idaho);
Cole vs. Smith, 58 Pac. 1086 (Colo.);

Federal Life Ins. Co. vs. Maxam, 117 N. E.
 801 (Indiana);

Collinson vs. Ream, 144 N. W. 1050;

Cheney vs. Bierkamp, 145 Pac. 691, at 692
 (Colo.);

Walker vs. McMillan, 160 Pac. 1062;

J. L. Owens Co. vs. Doughty, 110 N. W. 78
 (N. D.);

Guild vs. Moore, 155 N. W. 44, at p. 49 (N.
 D.);

Seattle National Bank vs. Powles, 33 Wash.
 21, at pp. 27 and 28; 73 Pac. 887;

Stuart vs. Hayden, 72 Fed. 402, at p. 411,
 Affirmed in 169 U. S. 1; 42 Law. Ed.
 639.

5. *The waiver cannot to avoided by reformation of the contract.*

(a) There is no proper pleading to sustain reformation.

Story Equity Juris, 14th Ed. Vol. 2, sections
 978 and 980;

34 Cyc. pp. 971 to 977;

Buchanan vs. Harrington, 53 S. E. 478.

(b) That appellants were seeking reformation was expressly disclaimed during the trial. (See Tr. p. 694.)

(c) There is no proof to sustain a claim of reformation.

34 Cyc., at pp. 921 and 974;

Story's Equity Juris. 14th Ed. Vol. 2, Sec. 978;

Williston Contracts, Vol. 3, Sec. 1525 p. 2714;

Hearne vs. Mutual Marine Ins. Co., 20 Wall. 488; 22 Law. Ed. 395, at pp. 396-7;

Simmons Creek Coal Co. vs. Doran, 142 U. S. 417, 35 Law. Ed. 1063;

Grieb vs. Equitable Life Assurance Soc., 189 Fed. 498, at p. 501; affirmed 194 Fed. 1021;

Long vs. Abstract Co., 158 S. W. 305 (Mo.);

Tedford Auto Co. vs. Thomas, 158 S. W. 500 (Ark);

Capps vs. Edwards, 60 S. E. 455 (Ga.);

Hesson vs. Hesson, 89 Atl. 107 (Md.);

American Fruit Co. vs. Barrett, 128 N. W. 1009 (Minn.);

Dennis vs. Northern Pacific Ry. Co., 20 Wash. 320; at p. 323; 55 Pac. 210.

As to Right of Lien

1. *The Lien sought to be foreclosed is of local statutory origin.*

“Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any * * * building * * * has a lien upon the same for the labor performed or material furnished by each respectively, whether performed or furnished at the instance of the owner of the property, subject to the lien, or his agent; and every contractor, sub-contractor, architect, builder or person having charge of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter: * * *”

Remingtons 1915 Codes and Stat. of Wash.,
Sec. 1129;

Remingtons 1922 Comp. Stat. of Wash., Sec.
1129.

2. *The lien statute being in derogation of the common law must be strictly construed in determining the parties benefitted thereby.* .

Tsutakawa vs. Kumamoto, 53 Wash. 231, at
p. 236; 101 Pac. 869.

3. *A Federal Court in enforcing a statutory remedy of the state in which it sits is bound by the*

construction of that statute placed thereon by the highest court of the state.

Detroit vs. Osborne, 135 U. S. 492, 34 L. Ed. 260;

Northern Pacific Ry Co. vs. Meese, 239 U. S. 614, 60 Law. Ed. 467 at 468; reversing 211 Fed. 254;

Loewe vs. Savings Bank, 236 Fed. 444, affirmed 61 Law. Ed. 360;

In re Seward Dredging Co., 242 Fed. 225; Certiorari denied, 245 U. S. 651; 62 Law. Ed. 531;

Columbia Digger Co. vs. Sparks, 227 Fed. 780 (C. C. A. 9th Cir.);

American Surety Co. vs. Bellingham Nat. Bk., 254 Fed. 54 (C. C. A. 9th Cir.);

25 C. J. Federal Courts, p. 832, and cases there cited.

Bank of Follansbee vs. Follansbee Lbr. Co., 248 Fed. 645.

4. *The Supreme Court of Washington has construed this and cognate statutes to require actual delivery upon the liened premises as a prerequisite to a lien.*

Huttig Bros. vs. Denny Hotel Co., 6 Wash. 122; 32 Pac. 1073;

Fuller vs. Ryan, 44 Wash. 385; 87 Pac. 485;

Gate City Lbr. Co. vs. Montesano, 60 Wash. 586; 111 Pac. 799;

Holly-Mason Hardware Co. vs. National Surety Co., 107 Wash. 74; 180 Pac. 901.

See also:

Jacobs Co. vs. Brandt, 44 Wash. 68; 87 Pac. 43;

Crane Co. vs. Farandis, 46 Wash. 436; 90 Pac. 1134;

Tsutakawa vs. Kumamoto, 53 Wash. 231; 101 Pac. 869;

State Bank vs. Ruthe, 90 Wash. 636; 156 Pac. 540;

Ashford vs. Iowa M. Lbr. Co., 81 Neb. 561; 116 N. W. 272;

Foster vs. Dohle, 17 Neb. 631; 24 N. W. 208;

Baker Lbr. Co. vs. Marathon Paper Co., 130 N. W. 866; 36 L. R. A. N. S. 875.

5. *There can be no lien so long as title to the materials for which a lien is claimed remains in the claimant.*

(a) The theory of such liens is that the labor or material has gone into and enhanced the value of the premises or structure against which the lien is claimed.

Lipscomb vs. Exchange Nat'l Bank, 80 Wash. 296; 141 Pac. 686;

Foster Lbr. Co. vs. Sigma Chi Chap. House, 97 N. E. 801, at p. 803 (Ind.).

(b) The term "furnish" in the lien statute imports a sale and delivery.

Burns vs. Sewell, 51 N. W. 224;

Baker Lbr. Co. vs. Marathon Paper Co., 130

N. W. 866; 36 L. R. A. N. S. 875 (Wis.);
Barnett vs. Stevens, 43 N. W. 661;
Foster Lbr. Co. vs. Sigma Chi Chap. House,
 97 N. E. 801;
Richmond Const. Co. vs. Richmond R. Co.,
 68 Fed. 105 and 118; 15 C. C. A. 289;
Williams vs. Chapman, 65 Am. Dec. 669;
Loonie vs. Hogan, 61 Am. Dec. 694.

6. *Title remained in appellants as to all materials, except possibly the small amount actually delivered.*

(a) Under appellant's contracts it was the intent that title should not pass until actual incorporation of the materials in the building. (See Articles II, V, XI, and XVII of the contracts, Tr. pp. 747 to 754.)

(b) Title never passes in absence of clear expression of such intent so long as anything remains to be done upon the article sold by the vendor.

35 Cyc., Sales, p. 229;
 24 R. C. L., Sales, Sec. 293, p. 31;
Clarkson vs. Stevens, 106 U. S. 505; 27 L.
 Ed. 139;
River Spinning Co. vs. Atlantic Mills, 155
 Fed. 466, at p. 471;
 Annotation in 50 L. R. A. N. S., at p. 122.

(c) The contracts being entire, title could not have passed as to the materials completely manu-

factured without delivery while other materials forming an integral part of the same contract remained wholly or partially incomplete.

24 R. C. L., Sales, Sec. 298, at p. 35;
 Annotation in 50 L. R. A. N. S., at p. 128;
North Pac. Lbr. Co. vs. Kerron, 5 Wash.
 214; 31 Pac. 595;
Meeker vs. Johnson, 3 Wash. 247, 28 Pac.
 542.

(d) Delivery to appellant's warehouse was not such a delivery as effected a change in title.

35 Cyc., Sales, p. 304;
 Annotation in 50 L. R. A. N. S. at p. 140;
Pittsburgh C. & St. L. R. Co. vs. Hicks, 19
 Am. Repts. 713.

7. *Profits are not lienable.*

Gray vs. Hickey, 97 Wash. 278; 166 Pac.
 625.

8. *The commingling in a claim of lien of lienable and non-lienable items destroys the lien.*

Gilbert Hunt Co. vs. Parry, 59 Wash. 646
 110 Pac. 541;
Robinson vs. Brooks, 31 Wash. 60; 71 Pac.
 721;
Whittier vs. Stetson Post Mill Co., 6 Wash.
 190; 33 Pac. 393;
Knibb vs. Martenson, 89 W. 595; 154 Pac.

1109;

Sheldon vs. Chicago Bldg. & Surety Co., 181
N. W. 282.

As to the Rank of Appellants' Lien, If Any

1. *Under the Washington statutes appellants were contractors.*

Young Men's Christian Assn. vs. Gibson,
58 Wash. 307; 105 Pac. 766;
Architectural Decorating Co. vs. Nichlason,
66 Wash. 198; 119 Pac. 177;
Chavelle vs. Island Gun Club, 77 Wash. 304,
at p. 310; 137 Pac. 511.

(b) A contractor's lien is subordinate to those of laborers and materialmen.

"In every case it which different liens are claimed against the same property the court in the judgment must declare the rank of such lien or class of liens which shall be in the following order:—1, all persons performing labor; 2, all persons furnishing material; 3, sub-contractors; 4, the original contractor; and the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; * * *"

Remington's 1915 Codes & Stat. of Wash.,
Sec. 1141;

Remington's 1922 Compiled Stats. of Wash.,
Sec. 1141.

As to the Amount Liable, If Any

From the contract prices must be deducted:

(a) Anticipated profits.

Gray vs. Hickey, 97 Wash. 278; 166 Pac. 625.

(b) The value of materials for which no claim is made. (See Items marked "N. C.", Exhibit 154, Tr. p. 766.)

(c) The value of materials not completely manufactured.

ARGUMENT

Either the Tacoma Millwork Supply Company had a series of contracts calling for the manufacture of specially designed material and its installation in the building, or those contracts were annulled by reason of the fraud which induced them, and there was no contractual relationship between them and the Building Company whatsoever. Upon the first hypothesis there is no right of lien because that had been expressly waived. Upon the second the appellants and Building Company were entire strangers to each other, except to the limited extent that the appellants actually furnished, i. e., delivered to the Building Company, for use in the building certain materials which they had worked up into the form of window frames and the like.

These propositions are mutually exclusive one of the other, a point apparently not observed by the trial judge, since his findings as set forth in his memorandum decision (Tr. p. 436, at pp. 463 to 467) apparently proceed upon the second hypothesis, while the decree entered, since it awards judgment in favor of these appellants upon their contracts and for the damages in the way of lost profits (Tr. pp. 512 to 514), goes upon the other. We believe that the appellants have chosen to rest their claims upon the first hypothesis, and that this court in reviewing the case will so find.

The Lien Waiver

It was not disputed in the court below that a provision for the waiver of the right to claim a lien is valid and enforceable when expressed in language "clear, certain and unequivocal", and supported by an adequate consideration. Neither was it claimed that the language of Article XIV of appellants' contract was wanting in clarity, certainty or exactness, nor that it was without consideration. No such contention is made here. The effect of said Article XIV was sought to be avoided solely upon the ground of fraud. On this point the trial court found that these appellants were induced to enter into this contract through fraudulent misrepresentation. (See Memorandum Decision, Tr. p. 441.) The correctness of such finding is the subject of attack by the receiver of the

Building Company. (See Receiver's Assignment of Error IX, Tr. p. 550.) For the purpose of our discussion we shall assume, without admitting and without intending in any way to prejudice the Receiver's appeal, that the alleged inducing fraud was sufficiently proven to entitle appellants to rescission of the entire contract. Our position throughout has been and is that the alleged fraud, if it vitiates the contracts at all, vitiates them in their entirety; that rescission can not be partial, but must be of the whole; but that appellants having nevertheless and notwithstanding their efforts to establish the fraud, waived it and elected to seek recovery upon and under their contract.

The rule denying partial rescission can hardly be gainsaid. It is in effect admitted, since counsel for these appellants said in the brief submitted to the trial court, "We are familiar with the principle that one cannot ordinarily rescind any part and still get the benefit of the contract".

"Partial rescission. A rescission must be in toto. A party cannot affirm a contract in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other, unless the two parts of the contract are so severable from each other as to form two independent contracts."

13 C. J. Contracts, Sec. 682, p. 623.

“It is plain that if a party to a contract seeks to avoid it by reason of the fraud or failure of the other party to comply with its terms, he cannot rescind it as to some of its provisions and rely upon it as to others. In order that this lien may be maintained it must appear that the petitioner has substantially performed his part of the contract, and *it must further appear that there is nothing in the contract itself which will prevent the establishment of the lien.* (Italics ours.) * * * If he (the petitioner) was induced to make the contract by reason of the fraudulent representations of Jaspar, on discovery thereof he could have rescinded it as a whole, and have brought an action at law for its breach, or he might have brought an action declaring upon a *quantum meruit* for the value of the labor and material furnished, or he could have availed himself of the remedy provided for the enforcement of a mechanics lien to recover for the value of the labor and material furnished.”

Girouard vs. Jaspar, 106 N. E. 849. (Mass.)

“Appellants (the lien claimants) do not seek to rescind the contract in toto and to recover the reasonable value of their services and materials. They do not allege that they were induced by fraud, misrepresentation or mistake to accept the water rights and mortgage, in ignorance of their real character, nor

do they, having failed to return the property delivered to them or to allege any reason for their failure to do so, sue for the damage resulting from the difference between that which they received and that which they contend they were entitled to. Having retained this property they must be held to have retained it in full payment of the amount due under the contract, and cannot be heard to say they accepted it in partial payment or on account. *They attempted in this action to avail themselves of the portion of the contract which fixes the amount of their compensation, and they cannot repudiate but must be held to be bound by the provisions thereof, which gave respondents an option to pay with water rights and a mortgage instead of money.*" (Italics ours.)

Bernard vs. Fisher, 177 Pac. 762 (Idaho).

"One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud. He may affirm the contract and sue for his damages; or he may rescind it and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other because a sale can not be valid and void at the same time.

Stuart vs. Hayden, 72 Fed. 402, at p. 411.

Affirmed in 169 U. S. 1, 42 Law. Ed. 639.

Since then the law will not permit an affirmance in part, to-wit, of that which is beneficial, and a rejection of the remainder, to-wit, that which is detrimental, what will it be said the appellants have done here? That they have attempted both to affirm and reject seems undeniable. They have sued on their contracts and for damages in the shape of lost profits, yet throughout their pleadings and their testimony they speak of and claim for reasonable values as if suing upon a *quantum meruit*. The two remedies are inconsistent.

“There can be no doubt that, where a contract is breached, the party injured may pursue one of two remedies: first, he may sue upon his contract and recover his loss of profit; or, second, he may waive the contract and sue upon a *quantum meruit*; but he cannot pursue both remedies, for they bear a different measure of damages. *Gabrielson vs. Hague Box & Lbr. Co.*, 55 Wash. 342, 104 Pac. 635, 133 Am. St. 1032. This is no doubt, the general rule.”

Gray vs. Hickey, 97 Wash. 278, at 279; 166 Pac. 625.

The acts of affirmance are: First, the claim of lien for materials manufactured under and in accordance with a contract, which materials generally speaking were only partially completed, and

with comparatively insignificant exceptions, wholly undelivered; second, the claim of lien for profits, which would have been earned had the contracts been fully performed. A claim to profits in a case of this kind can only rest upon the breach of some valid, subsisting contractual right, e. g., the prevention of performance of a subsisting contract. These acts are not single or isolated. They commenced with the filing of the notices of lien, they are carried into the answer and cross complaint, and into the amended answer, they permeate the testimony offered, they appear in the trial briefs, they form a ground of exceptions to the court's opinion (Tr. pp. 472 to 477) as well as to the decree entered, (Tr. pp. 538 to 542) they form the basis of the Assignments of Error, and fill the brief filed herein.

Their acts of rejection consist of the attempted proof of fraud and the statement of counsel that they are not relying upon the contract, which statement is very largely qualified by the express disclaimer of any attempt to seek reformation. (Tr. p. 694.)

Upon this record they must be held to have in fact elected to sue on their contracts. In that event all right to claim a lien is waived. But let us take them at their word, namely, that they are not relying upon the contract or contracts. Then one of two things must have happened. Either these contracts have been rescinded, or they are

to be reformed. And, first, of rescission.

The Building Company may or may not be liable for damages for the fraud perpetrated. With that we, in this brief, are not concerned, since such damages clearly do not afford any ground for a lien. But the contracts being rescinded and therefore treated as non-existent, the Building Company in not taking delivery of materials violated no rights of the appellants and caused them no damage for which the building premises can in any way be holden under lien foreclosure proceedings. The appellants and Building Company have on this theory become strangers to each other. There is no contract to manufacture materials according to special plans, or designs, but only a few isolated sales of window frames or scaffold bucks by the appellants to the Building Company, and the right to a lien is thus limited to those sales and to the value of the materials thereby actually furnished, an intolerable position for the appellants.

Driven then from an action on the contract, with its inexorable waiver, and from the complete fall and wiping out of these contracts through rescission thereof, appellants must perforce take refuge in reformation or in a claim of *quantum meruit*.

As to reformation, we have no hesitancy in asserting that there is no ground either in the pleadings or in the proof for such relief. The pleadings count on the contracts and set them out.

They allege that these contracts were induced by fraud, but do not claim that the agreements the appellants intended to make were other or different from those actually entered into, and naturally they do not set out the agreements intended to be made.

“In order to make out a good cause of action (for reformation of an instrument) the bill of complaint or petition should show every element necessary to entitle the complainant to equitable relief, with especial reference to the following: (1) The grounds of reformation; (2) the agreement actually made; and (3) the agreement which the parties intended to make.

* * *

“Reformation at the instance of a defendant should be made by alleging the mistake and asking affirmative relief by a cross bill, cross petition, or counter claim, and in such pleading the same rules as to the sufficiency of allegations apply as in the case of a bill or complaint. Relief cannot be had, however, without setting up facts upon which the equitable jurisdiction depends.”

34 Cyc, Reformation of Instruments, pp. 971 and 977.

“It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction be-

cause of mistake common to both parties, or because of mistake of one party, and fraud or inequitable conduct of the other.”

Story's Equity Jurisprudence, 14th Ed. vol. 2, Sec. 980.

“If a party demands equitable relief he must specially allege the facts upon which he seeks the aid of the court in the exercise of its equitable jurisdiction.”

Buchanan vs. Harrington, 53 S. E. 478, at 479 (N. C.).

There is no claim in the pleadings that the writing fails to embody the real agreement, and when it comes to the matter of proof appellants are met, first, by the fact that they expressly disclaimed any attempt at reformation (Tr. p. 694), and, second, by the fact that it is perfectly clear from the evidence that when the formal written contracts were submitted by the Building Company for execution these contracts were examined in detail, every provision was read and their contents fully known. Thereafter the contracts were executed in the shape in which they now appear in evidence as Exhibits 151, 152 and 153. Any claim that they were signed in ignorance of their true terms or by mistake is utterly vain. (See Tr. pp. 707, 714, 693, 695, 696, 698 and 699.) The fraud, if fraud there was, was not in the execution of the contract with the Millwork Supply Company, but

in the consideration for it, and hence is not such fraud as will give rise to a right of reformation.

“Fraud to be the basis of reformation of contract must be fraud in the execution thereof.

34 Cyc, Reformation of Instruments, 921.

“The grounds for reformation are mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, and to constitute a good cause of action the grounds upon which it is based must be alleged.”

34 Cyc, Reformation of Instruments, 974.

“The equitable doctrine of reformation of written instruments is usually applied where there has been a mutual mistake on the part of both parties to the contract, or else where there has been a mistake on the part of one of the parties and fraud in the other.”

Story's Equity Juris., 14th Ed. vol. 2, sec. 978.

“Where a writing owing to the fraud of one of the parties and mistake of the other, fails to express the agreement at which they arrived, reformation will be allowed.”

Williston Contracts, vol. 3, p. 2714.

“The party alleging the mistake must show exactly in what it consists and the correction

that should have been made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. *Beaumont vs. Bramley*, 1 Turn. & Rus., 41; *Breadalbane vs. Chandos*, 2 Myl. & C., 711; *Fowler vs. Fowler*, 4 De Gex & J., 255; *Sells vs. Sells*, 1 Drew. & Sm., 42; *Lloyd vs. Cocker*, 19 Beav. 144. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. *Rooke vs. Kensington*, 2 K. & J., 753; *Eaton vs. Bennett*, 34 Beav., 196. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. *Mortimer vs. Shortall*, 2 Dr. & War., 372; *Sells vs. Sells*, *supra*."

Hearne vs. N. E. Mutual Marine Ins. Co.,
87 U. S. 490 22 L. Ed. 397.

"The jurisdiction of equity to reform written instruments, where there is a mutual mistake or mistake on one side, and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court. *Fishback vs. Ball*, 34 W. Va. 644; *Shenandoah Valley R. Co. vs. Dunlop*, 86 Va. 346."

Simmons Creek Coal Co. vs. Doran, 142 U. S.
417, at 435; 35 L. Ed. 1063, at 1071.

“Reformation of a contract will not be granted by a court of equity unless there has been a mistake which is mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescission, but not for reforming a contract. Where there has been a mistake of one party, accompanied by a fraud or inequitable conduct of the remaining parties, in such cases the instrument may be made to conform to the agreement or transaction entered into according to the intention of the parties.”

Grieb vs. Equit. Life Assurance Soc., 189
Fed. 498 at 501.

In *Long vs. Abstract Co.*, 158 S. W. 305, the court declared the following doctrine axiomatic, namely:

“That a court of equity will construe and reform a contract so as to express the real intention of the parties thereto, or annul and cancel the same, where it is illegal and void for any reason; yet it will not make a contract for the parties thereto or reform the same except for the purpose of expressing the real intention of the parties.”

And in the further course of the opinion said:

“In the first place fraud is not a ground

for reforming a deed of trust, or any other contract for that matter, that I ever heard of. Fraud is well known ground for the cancellation of a contract, but not for its reformation."

(Opinion at p. 308.)

Reformation is therefore unavailing to these appellants.

As to a claim on *quantum meruit* we should again say that it is of no concern of ours, except to the extent that it shall form the basis of a right to a lien.

Right of Lien

The statute under which this claim is prosecuted gives a lien for all labor performed upon and for all material furnished, to be used in the construction of any building. The chief question here, therefore, is what constitutes a furnishing of material to be used in the construction within the language of the statute?

While this statute is to be construed liberally for the benefit and protection of those clearly within its provisions, yet, being in derogation of the common law and creating a lien wholly unknown to the common law, it must be strictly construed in determining those who are benefitted thereby.

"Liens of this character are in derogation of the common law. Depending solely on the

statutes, courts have persistently refused to extend their operation for the benefit of those who furnish supplies, means or money to carry on a work. unless they come clearly within the terms of the statute."

Tsutakawa vs. Kumamoto, 53 Wash. 231,
at p. 236; 101 Pac. 869.

Certain principles relating to this class of liens are thoroughly established by binding decisions of the Supreme Court of this state.

First. *To furnish materials within the contemplation of the statute there must have been a delivery thereof.* The preparation of materials specially designed for a building does not constitute commencing to furnish materials.

"Appellant contends that it commenced to furnish materials from the time that it began to prepare the same for shipment in the state of Iowa, and in consequence of its having commenced the preparation thereof before the execution of the mortgage its lien is superior to the mortgage lien, but the lien can hardly date from the time appellant commenced the preparation of the materials in another state. It was to furnish the materials delivered at the building in the city of Seattle, and its claim cannot be held to have attached before the delivery thereof. *Williams vs. Chapman*, 17 Ill. 423."

Huttig Bros. Mfg. Co. vs. Denny Hotel Co.,
6 Wash. 122, at p. 130; 32 Pac. 1073.

Appellants' contract required that the materials be delivered and put in place in the building.

Stated in another way, the proposition enunciated in the foregoing case and cases following it, hereinabove previously cited, amounts to this: That materials are not furnished within the meaning of the lien statute at least until there has been such a delivery of them as to pass title thereto. In the present case the appellants have never parted with possession or title to any materials, with the possible exception of the few window frames delivered to the building. The remainder were either at the factory in various stages of completion, or were stored at the warehouse which appellants secured and for which they paid the rental, and such materials were in said warehouse, insured by the appellants as their property. Without repetition of the authorities cited, it seems to admit of no doubt that title had not passed from the appellants. The delivery was not made as by the contract required, it was not a delivery to any third party, and the appellants, while as a matter of accommodation they permitted the Building Company's painters to have access to such of the work as was completed, nevertheless retained both possession and control of the material, either to complete its manufacture or to prepare it for installation in the building, and insured it as their own. Furthermore, after

the suspension of building operations they recognized that title had not passed, and so made the abortive effort nearly two months after all building operations had ceased to surrender the keys of the warehouse to the receiver of the Building Company. (Tr. p. 708, Exhs. 168-169.) And during the trial they argued:

“But Your Honor has missed the real point in the situation, that the material has been tendered, and that a simple order will declare its relationship to the building, and hence the building is enhanced rateably.” (Cf. exceptions to Decree, paragraph 14, Tr. p. 47, also appellant’s Brief p. 61.)

Second. *Even though there should have been a delivery sufficient to pass title, yet such delivery does not constitute a furnishing within the lien statute unless the materials either are actually used in the building or delivered on the ground for use therein.*

In *Gate City Lumber Co. vs. Montesano*, the court was considering the right of a materialman to recover against the city of Montesano for materials furnished a contractor on public work, the city having failed to require the contractor to enter into the bond contemplated by the statute in connection with such contracts. The claimant in response to inquiry from the contractor had stated that he could furnish the lumber for \$9 a thousand f. o. b. Gate, Washington. Gate is some thirty

or forty miles distant from Montesano. The lumber was ordered and delivered on the cars at Gate by the claimant and shipped to Montesano. What became of it thereafter was uncertain. Some of it was actually used. Some more was perhaps delivered on the ground, and afterwards diverted, and a further part was diverted direct from the cars at Montesano to other work. Under the circumstances, however, there was no question but what title to the lumber had passed from the claimant to the contractor when the same was loaded on the cars at Gate. His Honor, Judge Rudkin, then Chief Justice of the Washington Supreme Court, wrote the opinion, and said:

“The question then arises, who is a materialman and what is a just debt incurred in the performance of contract work within the meaning of the act of 1909? In the case of *Fuller Co. vs. Ryan*, 44 Wash. 385, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein. See also *Foster vs. Dohle*, 17 Neb. 631, 24 N. W. 208; *Weir vs. Barnes*, 38 Neb. 875, 57 N. W. 750. We are not disposed to place a broader construction on the term *materialman* and *just debts incurred in the performance of contract work* under this statute.”

Thereafter the opinion proceeds by quoting with

approval from *Foster vs. Dohle*. The opinion concludes as follows:

“The judgment will therefore be reversed and a new trial awarded for the purpose of ascertaining the value of the material actually used in the performance of the contract or delivered at the works for use therein. The court will give judgment for such value when ascertained, but the respondent is entitled to recover nothing from the city beyond this.”

All this is in conformity with the theory underlying such liens, namely, that the labor or material has gone into and enhanced the value of the premises or structure against which the lien is claimed.

“The object of these statutes is to secure a lien to the laborer, and the materialman, for that which goes into the finished structure.”

Tsutakawa vs. Kumamoto, 53 Wash. 231, at 235; 101 Pac. 869;

quoted with approval in:

Gilbert Hunt. Co. vs. Parry, 59 Wash. 646, at 649; 110 Pac. 531.

How then can there be a lien in the instant case when there not only has been no delivery, but on the contrary there has been retention of title? We submit without fear of contradiction that there

is no decision of the Supreme Court of Washington in a lien case upholding the right to a lien under such circumstances.

Appellants, however, rely upon *Western Hardware & Metal Co. vs. Maryland Casualty Co.*, 105 Wash. 54, 177 Pac. 703, 181 Pac. 700. This was not a lien case, but was an action to recover against a bond given by a contractor in connection with a contract made with Seattle School District No. 1 for furnishing the material and installing a heating and ventilating plant in a school house in Seattle. The statute governing in such cases provides that the bond shall be conditioned that the contractor shall “* * * pay all laborers, mechanics and sub-contractors and materialmen, and all persons who shall supply such person or persons or sub-contractor with provisions and supplies for the carrying on of such work * * *” (italics ours).

Remington's 1915. Code, Sec. 1159;

Remington's 1922 Compiled Stats., Sec 1159.

The court in that decision considered the analogy between mechanics and materialmens lien statutes and bonding statutes, such as the one under consideration, and said:

“This analogy * * * would seem to be complete when both the lien and bonding statutes define the work and material, the payment for which is secured by the lien or the bond

in substance the same.”

The court then proceeds to review certain of its previous decisions, both upon the lien statutes and upon the bonding statutes, and also certain cases from other jurisdictions, and after so doing approves the rule in *Huttig Bros. vs. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, that while there could be no lien before the actual delivery of the materials to the premises, a lien would be allowed for the materials actually so delivered, although they were not incorporated into the building, saying:

“While we concede that the authorities are not harmonious upon the question of the necessity of the material actually going into and becoming a part of the structure, in order to support a lien right, which is the particular question we are now considering, we think the decided weight of authority is in harmony with the early holding of this court in the Denny Hotel case and the cases from other courts above quoted from.” (Opinion at p. 66.)

It will be noted, therefore, that up to this point the decision goes no further than reaffirming the rule that actual incorporation into the structure is unnecessary, and in so doing cites the case of *Crane Co. vs. U. S. Fid. & Guar. Co.*, 74 Wash. 91, 132 Pac. 872, which distinctly holds that the bonding statute covers claims not lienable under Rem. 1915

Code, Sec. 1129. What is of equal significance, however, the court does not mention or apparently consider the cases of *Fuller vs. Ryan*, 44 Wash. 385, 87 Pac 485, and *Gate City Lumber Company vs. Montesano*, 60 Wash. 586, 111 Pac. 799, in the first of which it was said:

“If the materials were not used in the building nor taken to the premises, we do not think it could be said that they were purchased to be used in such building within the meaning of the statute. The reason for allowing a lien to secure the purchase price of building material would seem to be absent where such material was neither used in the building nor taken to the premises for that purpose; and it would be difficult to see why the vendor of such material would have any better right to a lien than would the seller of any other species of personal property.” (Opinion at p. 386.)

The opinion in the *Western Hardware Company* case then reverts to the peculiar language of the bonding statute, and after calling attention to the fact that the condition of said bond “is that the contractor shall pay sub-contractors and all persons who shall supply sub-contractors with provisions and supplies *for the carrying on of such work*”, proceeds as follows:

“The words ‘provisions and supplies’, so used we think include materials such as the

sheet metal furnished by respondent, and the words 'for the carrying on of such work', refer to the furnishing to sub-contractors of such material for that purpose in good faith, though it may not be actually used in the construction of the building or plant by reason of some fault of the contractor or sub-contractor and without fault of the one so furnishing the material."

Therein is the crux of the decision. The opinion proceeds further, and in distinguishing the Gate City Lumber case says: that the delivery to the railroad company was there held, to be,

"not such delivery at or near the place where the lumber was to be used as to give the lumber company a right of action upon the bond. In that case there was no understanding and necessity for the lumber being delivered at a shop or place where the contractor or sub-contractor was specially preparing his material before being placed in the structure as in this case."

and in the conclusion Judge Parker says:

"The question of whether a delivery of material to a contractor or sub-contractor is such as to entitle the one so furnishing it to recover upon the bond, if the work be public, or to a lien if the work be private, *is not one which can be determined by a hard and fast rule applicable to all cases.* It seems to us that where material is delivered to a sub-contractor

in good faith for the carrying on of the work as in this case, at a convenient shop of the sub-contractor, where it is understood that the material is to be prepared for the structure, and the work of such preparation is there actually being done, such delivery is sufficient to entitle the materialman so furnishing and delivering the material *to recover upon the bond given for the security of the materialman.*"

(Opinion p. 68; italics ours.)

It will be noted with respect to this decision, first, that in the last analysis the claim is upheld upon the peculiar language of the statute referring to the furnishing of provisions and supplies for the carrying on of the work; second, that the claimant had made delivery of his material and parted with the title thereto; third, that it was understood between the contractor who gave the bond and the sub-contractor and the materialman that the material should be delivered at the shop of the sub-contractor to be prepared for use in the structure, and the contractor was notified that such delivery had been made. In the present case there is no materialman who has parted with title to his property, nor is there any estoppel to the prejudice of the other lien claimants. Upon the peculiar facts then before the court the decision as to the place of delivery, if it can be said to be a decision and not mere dictum, rests up the theory that the bonding company, a compensated surety, was re-

sponsible for the acts of the contractor, and the contractor, having permitted the work to be done at the sub-contractor's shop and delivery to be made there, was estopped to say that such delivery was not a delivery to the building being improved.

Such construction has been placed upon this decision by the Supreme Court of the state of Washington by its holding in the later case of *Holly-Mason Hardware Co. vs. National Surety Co.*, 107 Wash. 74, 180 Pac. 901. This decision, rendered five months after the decision in the Western Hardware Company case by the same department, construing the same statutes, makes no mention of the Western Hardware decision, but says:

"It will be observed that the statute (Remington's 1915 Codes, sections 1159 to 1161-1) does not in terms make use in the building a necessary prerequisite to a right of recovery on the bond for materials furnished, nor does it make delivery on the grounds such a necessary prerequisite. This court has held, however, in construing a statute with similar provisions, of which the present statute is but amendatory, that one or the other of such conditions must be shown before a recovery can be had."

Judge Fullerton, writing the opinion, then proceeds to quote from the decision in the Gate City Lumber Company case and to repeat the quotation

there made from *Foster vs. Dohle*, 17 Neb. 621, 24 N. W. 208, which in part is as follows:

“The contractor, however, unless expressly constituted such, is not the agent of the builder and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein, and as there is nothing to show that any of the material not allowed by the court below was delivered at or used in the building the owner thereof is not liable for the same.”

The principle of the Nebraska case is approved as being “eminently just”, is held to constitute a bar to recovery except for such material as was actually delivered at the building, and the opinion then concludes with this language:

“We have concluded therefore to direct a reversal and a remanding of the cause with instructions to ascertain what proportion of the materials sold the contractor were actually used in the construction of the building or were actually delivered on the ground for use therein.”

This opinion, therefore, reiterates the rule that notwithstanding a sale and the passing of title, yet the further condition of actual use or actual delivery upon the ground is a further prerequisite to the establishment of a lien or claim against the bond. Neither of those prerequisites obtained in

the instant case.

Decisions from other jurisdictions are of little importance, since the construction of the Supreme Court of the State of Washington is binding upon this court, but it may not be out of place to observe that the holding of the Supreme Court of the State of Washington is in line with the holding of many of the other states of the Union.

See:

Ashford vs. Iowa & M. Lbr. Co., 81 Neb. 561, 116 N. W. 272;

Foster vs. Dohle, 17 Neb. 621, 24 N. W. 208;

Baker & S. Lbr. Co. vs. Marathon Paper Co., 130 N. W. 866, 36 L. R. A. N. S., 875 (Wis.);

Foster Lbr. Co. vs. Sigma Chi Chap. House, 49 Ind. App. 528, 97 N. E. 801;

Barnett vs. Stevens, 43 N. W. 661;

and compare:

Bank of Follansbee vs. Follansbee Lbr. Co., 248 Fed. 645;

Atlantic Terra Cotta Co. vs. Moore Const. Co., 80 S. E. 924 (W. Va.);

Voightman & Co. vs. Southern Ry. Co., 131 S. W. 982 (Texas);

Fetcher Crowell Co. vs. Chevalier, 36 L. R. A. N. S. 871, 81 Atl. 578 (Me.).

The cases cited by these appellants, which in-

clude all those cited on the same point by counsel for Washington Brick, Lime & Sewer Pipe Company, fall chiefly into two groups:

First, where there was an actual delivery to the lienied premises of all the material for which a lien was claimed, but some part thereof was not actually used, due to there being a surplusage, a subsequent diversion by the principal contractor, a change in the plans, or other similar cause. In this group are: *Crane Co. vs. U. S. Fidelity & Guar. Co.*, 74 Wash. 91, 132 Pac. 872; *Nelson vs. Iowa Eastern R. Co.*, 51 Iowa 184, 1 N. W. 434; *Burns vs. Sewell*, 48 Minn. 425, 51 N. W. 224; *John Paul Lbr. Co. vs. Hormell*, 63 N. W. 718; *Minneapolis Sash & Door Co. vs. Hedden*, 154 N. W. 511; *North Land Pine Co. vs. Northern Insulating Co.*, 177 N. W. 635. With this group we have no quarrel. They do not fit the case presented by the lien claimants now appealing. However, we call further attention to the fact that the decisions in *John-Paul Lbr. Co. vs. Hormel*, and *Minneapolis Sash & Door Co. vs. Hedden*, are upon their special fact contrary to the rule in the state of Washington as laid down in *Knudson-Jacobs Co. vs. Brandt*, 44 Wash. 68, 87 Pac. 43, and *Little Bros. Mill Co. vs. Baker*, 57 Wash. 311, 106 Pac. 910. The definition of the term "furnish" made by the Supreme Court of Minnesota in *Burns vs. Sewell* should be noted, namely:

"In the ordinary understanding of the terms

‘furnished for the erection of’, etc., the furnishing the material is complete when it is sold and delivered for the purpose of the erection;” (51 N. W. at p. 225).

Second, where there was delivery of material to a common carrier in accordance with the contract of the material man, though at a point distant from the lien premises, the holdings being that such delivery conforming to the contract passed title from the material man and constituted a furnishing sufficient to support a lien. In this group are *McEwen vs. Montana Pulp & Paper Co.*, 90 Pac. 359, *Clarke vs. Lindsey & Co.*, 47 Pac. 102, *Watson Coal Mining Co. vs. James*, 72 Iowa 184, 33 N. W. 622; *Congdon vs. Kendall*, 53 Neb. 282, 73 N. W. 659; *Manufacturing Co. vs. Hunter*, 15 Neb. 32, 16 N. W. 759; *King vs. Cleveland Ship Building Co.*, 50 Ohio State 320, 34 N. E. 436. With this group we disagree. They are not controlling here, since they are in direct conflict with the clear and specific rulings of the Supreme Court of Washington in *Huttig Bros. vs. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, *Gate City Lbr. Co. vs. Montesano*, 60 Wash. 586, 111 Pac. 799, *Holly-Mason Hdw. Co. vs. National Surety Co.*, 107 Wash. 74, 180 Pac. 901.

Furthermore the court will find upon examination that in all of the cases in either of these two groups there was a specific finding as a basis for the lien that title had passed from the lien claim-

ant either to the owner of the lien premises or to the owner's contractor. Here, i.e., in the cases of Tacoma Millwork Supply Company and Washington Brick, Lime & Sewer Pipe Company, title never passed from the lien claimant.

Without attempting to group or classify the remaining cases cited from other jurisdictions, it may safely be said that they are distinguishable, and none constitutes an authority for the point sought to be made by these appellants.

In *Evans Marble Co. vs. International Trust Co.*, 6 Atl. 667, the lien claim of Bevan & Sons was allowed for work done away from the building on materials actually delivered to and incorporated into the structure. (See opinion p. 671.) The statement on page 72 of the Tacoma Millwork Supply Company's brief, as follows: "Delivery was not made", is contrary to the fact.

In *Emery vs. Hertig*, 61 N. W. 830, the sole question was whether a lien could be had where, when the work was done for which the lien was claimed, there was no knowledge or intent that the materials upon which the labor was being performed were to be incorporated in some particular building. The materials upon which the work was performed were actually used (see opinion p. 831) and the holding is merely that a specific intent that the material worked upon should be used in a particular building is not required to exist at the

time the work is done when from the nature of the work it is obvious that the materials are intended for use in some building.

In *Sheldon vs. Chicago, Building & Surety Co.*, 181 N. W. 282, the lien claimant had a contract similar to the material contract of the Tacoma Millwork Supply Company. About half of the material called for by this contract was delivered prior to the failure of the principal contractor. The balance of the material was delivered under a new contract with the owner and paid for. Upon the failure of the principal contractor the claim of lien was filed for "not only the mill work actually delivered prior thereto, but covered also millwork made up under the contract not yet delivered". The amount for which a lien was allowed was merely the value of the work actually delivered after deducting payments theretofore made. The sole contention was "that claimant is not entitled to a lien in any amount because it filed a lien for the full amount of the contract price at a time when it had performed less than half the contract." Under these circumstances the language quoted on page 67 of Tacoma Millwork Supply Company's brief and there characterized as a flat-footed holding, is dictum. It was recognized to be dictum by the Supreme Court of Iowa in the following language:

"But as said, it is not necessary to expressly decide the point, since, even though claimant

did not come strictly within the rule above suggested, yet if it in good faith believed it did its right to a lien will not be defeated by reason of having made a mistake as to its legal rights in the absence of any showing of bad faith." (181 N. W. opinion sub. div. 4, pp. 290 to 291.)

In *Atlantic Terra Cotta Co. vs. Moore Const. Co.*, 80 S. E. 924, the Supreme Court of Appeals of West Virginia assumes the existence of certain exceptions to the general rule "that there can be no lien for material furnished a contractor, not used and incorporated in the building or structure". But without deciding the validity of any one of such exceptions, holds that the facts before it do not fall within any of them. (See opinion p. 926 and 927.)

In *Pittsburg Plate Glass Co. vs. Leary*, 126 N. W. 271, 31 L. R. A. N. S. 746, a lien was attempted to be established for plate glass broken in transit between the works of the lien claimant and the building. The lien was denied, following *Fuller & Co. vs. Ryan*, 44 Wash. 385, 87 Pac. 485. (See 31 L. R. A. N. S. at p. 758.)

Reference is also made to certain Pennsylvania cases, notably *Hinchman vs. Graham*, 2 Serg. & R., 170. The peculiarities of the statute and of the facts under and upon which that decision was made are clearly indicated in the annotations found in

31 L. R. A. N. S. at page 753, and L. R. A. 1915-E, at p. 306.

With respect to the case of *Thompson, McDonald Lbr. Vo. vs. Morawetz*, 149 N. W. 300, L. R. A. 1915-E 302, largely relied upon by appellants (see Tacoma Millwork Supply Company brief pp. 68 to 70) we call attention to the comment of the annotator found in the note appended to the report of said case in L. R. A. 1915-E at page 304, as follows:

“It would therefore seem, in view of the further fact that the decision in *Thompson, McDonald Lumber Co. vs. Morawetz* is opposed by many decisions and fully supported by none, that the court may have gone a little further in sustaining the lien than other courts will be willing to go.”

With respect to the cases of *Trammell vs. Mount*, 68 Texas 210, 4 S. W. 377, and *Berger vs. Turnblad*, 98 Minn. 163, 107 N. W. 543, we invite a comparison with *Baker vs. Yakima Valley Canal Co.*, 77 Wash. 70 137 Pac. 342.

To sum up the whole matter, we quote the conclusion reached by the annotator in the note in L. R. A. 1915-E at page 306:

“On the whole, it would seem that when the legislature abandons the theory that a lien may be filed only for material used in the

building or for the benefit of the owner, it should in justice to all parties provide some basis for the lien, and that, in the absence of such a provision, the courts should assume that it did not intend to provide for a lien for material not actually employed upon the premises, in the absence of a delivery of the material upon the premises or other act equivalent thereto, as notice to or an implied assent by the owner."

Class or Rank of Lien

The Washington statute ranks or classifies the several liens allowed under the mechanics liens law in the following order of priority; first, laborers, second, material men, third, sub-contractors, and, fourth, the original contractor.

Counsel for these appellants admit that they are in the position of sub-contractors on the bank quarters contract. They claim they are materialmen as to the \$65,000 or material contract, and that they are to be ranked as laborers with respect to the \$30,000 or erection contract. They liken their position in this latter contract to that of E. E. Davis & Company, who had the contract for the erection of the steel (see appellants' brief p. 97). Yet E. E. Davis & Company was ranked by the lower court as a contractor, and has accepted that classification. It needs no reiteration of the

authorities cited to prove the correctness of the lower court's action with respect to the E. E. Davis & Company contract, and the Tacoma Millwork Supply Company's so-called erection contract is admittedly subject to the same rule.

As to the \$65,000 or material contract, we might concede that if such contract stood alone it would entitle these appellants, if they were awarded a lien at all, to a materialman's lien. But that contract does not stand alone, since these appellants themselves in their pleadings and in their proof and at all times asserted that the three contracts were entered into as one and the same transaction, that each formed part of the consideration for the other. As Mr. R. T. Davis testifies (Tr. p. 701), "The two contracts designated as a material contract and erection contract are dated alike, and combined they provided for the installation in place of the interior millwork."

Amount of Lien

We take it to be self-evident that if any lien is allowed the amount thereof cannot exceed the contract price less the value of those items for which no claim is made, designated by the key letters "N. C.", on Exhibit 154. In addition certain other deductions must certainly be made, e. g. the items of anticipated profits and the item of bond premium. (See *Gray vs. Hickey*, 98 Wash. 278, 166 Pac. 625.)

Furthermore we believe it nearly as axiomatic that a deduction must likewise be made of the total value of the work which was incomplete when the building operations suspended. A court of equity would not decree that the Millwork Supply Company should complete the manufacture of such material. Specific performance is not decreed in such cases. While there is some testimony as to what it would cost to complete this work, there is none which will enable this court to say what the receiver of the Building Company would have to pay to have that work finished. It can not be said under the testimony submitted that the value of the building has been enhanced to the extent of \$20 per door, the value assigned to them in their incomplete state, when the total value finished does not exceed \$32.00, and for all the proof shows it might cost \$20 or more per door to get someone to take on the job of completing their manufacture. Courts ought not to and will not indulge in such speculations. Hence since the value to the building of the unfinished material is the question to be decided, and since that value depends entirely upon the unknown quantity of what it would cost to finish, as compared with newly manufactured materials, there is no sufficient basis for determining the proper value to be assigned to this incomplete work. It must be thrown out entirely.

We submit therefore the subjoined tabulations of deductions which must be made from the con-

tract prices in determining the amount of any claim in case a lien is awarded. The figures are the same as submitted to the trial court, and are taken from the testimony of Mr. Lindstrom. The only criticism made of these figures so far as they relate to "N. C. materials" was that we did not allow credit on the values assigned for such work, as was actually done upon these materials and for wastage. However, since the item of wastage and that of the work done both enter into the value of the materials when complete, and since the appellants make no claim for these materials at all, it is impossible to see why the total value of the finished material should not be deducted. We heretofore supposed that a waiver of the whole was a waiver of each item comprised in the sum total.

The items in the following tabulation are taken from Exhibit 154, the prices from the Transcript, pp. 722 to 726. The court, however, will observe that certain minor items for which the appellants are making no claim are not included, so that actually the figures here given should be still further reduced, although only to a small extent.

Material contract, agreed price	\$65,000.00
Door buck contract, Exh. B-1 to Exh. 154, Tr. pp. 769 and 773	1,266.00
Bank quarters contract, Exh. C-1 to Exh. 154, Tr. pp. 770 and 773	1,957.00
Extra work, Exh. E-1 and F-1 to Exh. 154, Tr. pp. 772 and 773	208.00
Total	\$68,431.00

DEDUCTIONS

Profit claimed on balance of main (i.e. material)	
contract, Tr. p. 773	\$ 1,000.00
Bond premium, Tr. p. 773	718.41
Miscellaneous deductions for no claim work, as follows:	
18,000 lin. ft. of base mold @ 10c	1,800.00
18,000 lin. ft. of base shoe @ 6c	1,080.00
19 pcs. 9'4" mullion casing 190 lin. ft.	
451 pcs. 7' mullion casing 3608 lin. ft.	
	<hr/>
	3798 lin. ft. @ 35c 1,330.00
38 pcs. 9' 4" sub-jams 380 lin.ft.	
830 pcs. 6'10" sub-jams 6640 lin ft.	
	<hr/>
	7020 lin. ft. @ 20c 1,404.00
320 pcs. 9'8" head sub-jams 3220 lin. ft.	
45 pcs. 9'2" head sub-jams 450 lin. ft.	
28 pcs. 8' head sub-jams 280 lin. ft.	
39 pcs. 4'4" head sub-jams 234 lin. ft.	
	<hr/>
	4184 lin. ft. @ 20c 836.80
450 doors at \$32 (Cf. Tr. pp. 720, 726 and 769)	14,400.00
200 mahogany transom sash at \$2.25 (Tr. p.	
769)	500.00
	<hr/>
	\$23,069.21
Payments made	6,240.50
	<hr/>
Total deductions	29,309.71
	<hr/>
Total claims	\$68,431.00
Total deductions	29,309.71
	<hr/>
Total lienable, if any	\$39,121.29

To this amount should or should not be added,
depending upon the considerations heretofore ad-

vanced, the labor performed on the erection contract, to-wit, \$6,043. (See Tr. p. 772.)

In view of this state of the record, the notice of lien upon which appellants rely having clearly included non-lienable items, which must have been known to be non-lienable, and the exact amount of the non-lienable items being indeterminable, the entire lien must fail. There was no request to amend by eliminating the non-lienable items, and it is and was settled law that profits are not lienable.

“When an unspecified and indeterminable portion of the materials mentioned in the claim consists of non-lienable items which cannot be segregated from the general aggregate, the claim is of no effect.”

Kerr on Mechanics Liens and Building Contracts, Section 377.

“It may be conceded that where some single non-lienable item, or even several, are mistakenly included in a claim of lien and such items can be readily segregated from those which are lienable, that such fact will not necessarily destroy claimant’s right of lien; but when the commingling occurs in such manner that the court is unable to determine with certainty what are and what are not lienable items in the claim made, then the rule seems to be that the entire claim of lien is of no effect.”

Gilbert Hunt Co. vs. Parry, 59 Wash. 646,
at 650; 110 Pac. 541.

Conclusion

The receiver of the Building Company asks to join in this brief and to have it considered as submitted on his behalf as well.

We submit therefore that appellants' case is without equity, that no error was committed by the trial court to their prejudice, and that the appeal should be in all respects denied.

Respectfully submitted,

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

FORBES P. HASKELL, as Receiver of the Scandinavian
American Building Company, a corporation, *Appellant*,
vs.

McCLINTIC-MARSHALL COMPANY, a corporation, E.
E. DAVIS & COMPANY, a corporation, et al.,
Appellees.

BEN OLSON COMPANY, a corporation, *Appellant*,
vs.

McCLINTIC-MARSHALL COMPANY, a corporation, E.
E. DAVIS & COMPANY, a corporation, et al.,
Appellees.

J. P. DUKE, as Supervisor of Banks of the State of Wash-
ington, etc., *Appellant*,
vs.

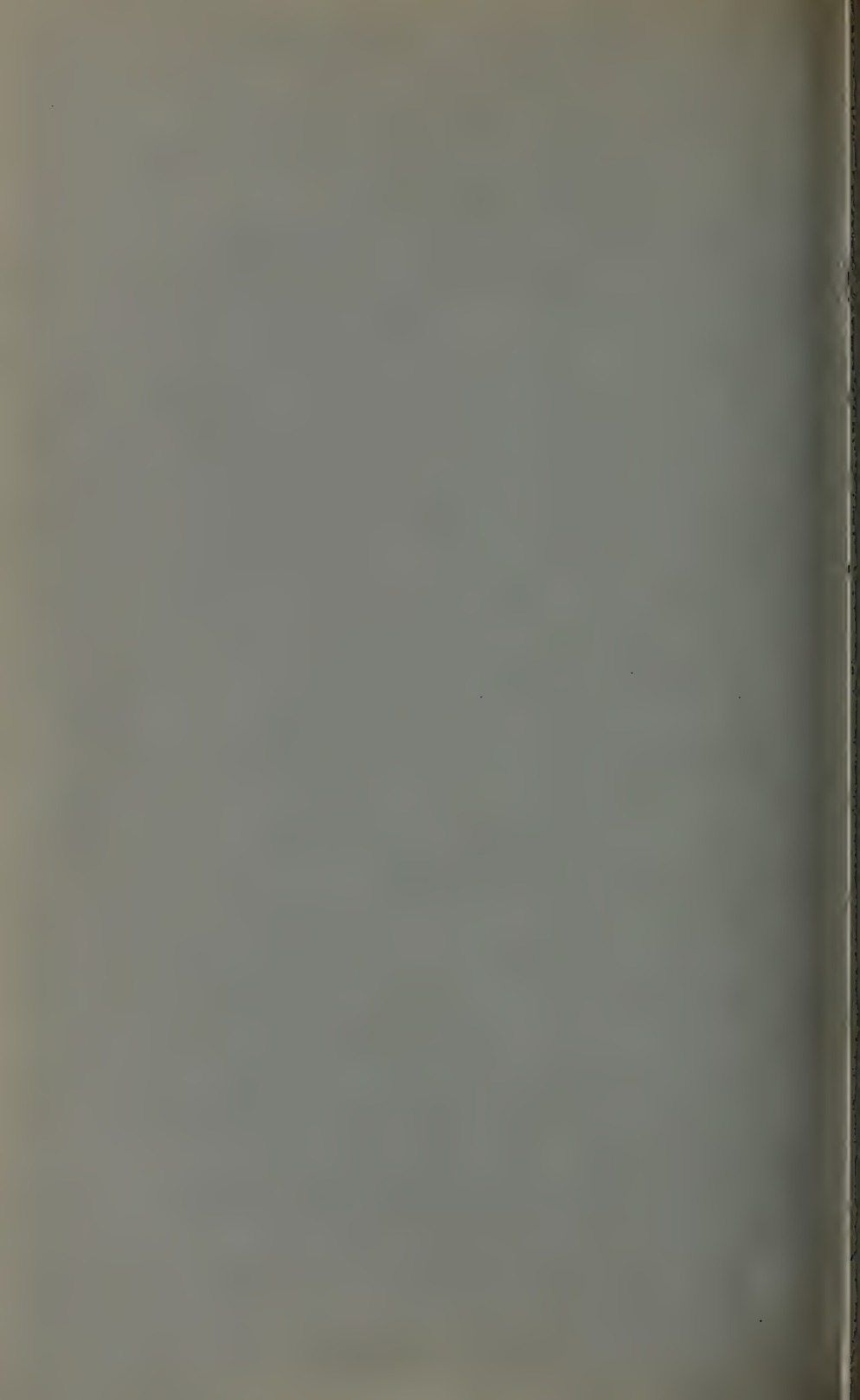
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*Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division*

**Answering Brief of E. E. Davis & Company, Appellees,
to the Above Appeals.**

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No. 3953.

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STATEMENT.

E. E. Davis & Company, while not desiring to unnecessarily multiply the labors of this court with a multitude of briefs, and while relying in large measure upon the briefs of others filed herein to

answer the question raised against its lien, where others are similarly situated and have filed comprehensive briefs herein, yet this appellee deems it necessary to present separately some features which affect the defense of its lien claim as allowed by the trial court differently from the claims of others involved in these appeals.

It may not be amiss to say that E. E. Davis & Company is entirely distinct from R. T. Davis, and others, who constitute the Tacoma Millworks Supply Company. E. E. Davis & Company had the contract for the steel erection of this proposed bank building, and was allowed by the trial court for this work a contractor's mechanic's lien against this building and the lots upon which it is situated in the sum of \$30,349.61, together with interest amounting to \$2,341.52 and for an attorney's fee of \$3500.00 and for costs and disbursements taxed in the sum of \$5.00 (Record 511-512).

A contractor's lien being the lowest ranking of mechanic's liens, E. E. Davis & Company is interested in the reduction or defeat of all other mechanic's liens allowed herein, as well as of the two mortgages claimed by the Bank and by the Receiver. (Record p. 520 XXXIII.)

While the trial court found that this appellee, as well as several others had signed contracts containing a clause waiving the right to a mechanic's lien, yet the court also found that this waiver was fraudulently obtained, and was therefore not binding upon this appellee and certain others, to-wit (Finding No. 33, Record p. 520):

“That the waivers of lien made by the following defendants, to-wit * * * E. E. Davis & Company * * * were induced by and made in reliance upon certain false material representations made by or on behalf of the defendant Scandinavian American Building Company, which representations amounted to and constituted constructive fraud, and that by reason thereof said waivers are decreed to be of no force and effect, and that in addition thereto, the defendant E. E. Davis & Company, upon discovery of the falsity of said representations and upon the breach by the defendant Scandinavian American Building Company of its contract, promptly rescinded its contract with said defendant Scandinavian American Building Company.”

We assert that these findings were amply justified by the evidence, and there is no showing to the contrary by any of the parties appellant attacking our lien upon this ground.

E. E. Davis & Company, as soon as it had learned of the falsity of these assertions, relying upon which it had signed the lien waiver clause of

the contract, notified the Building Company in writing of its rescission of the contract (Record p. 392). That it pleaded these facts of this rescission and asked for the reasonable value of its work and labor and not the contract price (Record p. 374), and maintained this position in its pleadings and in its proofs and in the award under the decree throughout, to which there was no objection on the part of any one; also lien notice (Record pp. 394 to 398).

ANSWERING THE BRIEF OF FORBES P. HASKELL, JR., AS RECEIVER

Haskell, as Receiver, in his opening brief (pp. 52 to 65, incl.), insists that the various claimants who in their contracts had waived their lien right, were bound by this waiver, in spite of the fact that this might have been obtained through fraud of the Building Company, because, as the Receiver claims, these claimants did not *rescind* the contract, but attempted to recover *under the terms of the contract*.

While we agree with this principle, it cannot be urged against E. E. Davis & Company, because, as set

forth in our statement above, this claimant *did rescind* the contract and attempted to, and did, recover on a *quantum meruit* and not under the contract. The rule, however, is, we believe, applicable to the Ben Olson Company claim, and to the Tacoma Millworks Supply Company claim, for these parties did not rescind, but sought to recover under the contract. This appellant, the Receiver admits, made a sufficient showing of fraud to estop the claim on the Building Company's part of waiver, but for this action on the part of some of the claimants in still adhering to the contract they are not in this position (p. 58, Receiver's brief). "Assuming, then, that there has been a false misrepresentation established upon which the lien claimants who waived their claims acted upon discovery of that fraud, such claimants might pursue one of two remedies * * *;" and so E. E. Davis & Company did, rescinding and suing upon a *quantum meruit*.

The Receiver, at page 55, cites a number of cases to the effect that a waiver of lien is not disregarded, and the lien right restored, by the Owner's failure to pay according to the terms of the contract.

While this may or may not be the law, it is not material in this case, or with E. E. Davis & Company, for its rescission was not on account of the

failure of the Building Company to pay *alone*, but also because of the discovery of fraud which induced it to sign the contract with this waiver. In the first place, these authorities are not in point, even upon the theory upon which they are advanced, for they are applicable only to the case of a divisible contract, the clauses of which are independent and not dependent. The present contracts, however, were made by their very terms entire, indivisible and dependent.

Moreover, when E. E. Davis & Company rescinded its contract for fraud, it was as if no contract had ever existed. The contract was void in toto—rescinded in toto, and we sought to recover—and did recover, on the equitable principle that one having parted with money or property, or benefited another under a contract, rescinding for the fraud of the other, can recover for the value of the benefit derived by the other under the contract.

ANSWERING THE BRIEF OF THE APPELLANT BEN OLSON COMPANY.

This appellant, Ben Olson Company, claimed a contract with the Scandinavian American Building Company for supplying certain hardware and heating and plumbing articles and fixtures, for which it claimed a mechanic's lien.

The trial court gave it a general judgment against the Building Company for some \$13,000.00, but denied it any mechanic's lien. In this appeal it is seeking to enlarge this judgment and to obtain a lien as a contractor, and announces in its opening brief on appeal: "This appellant complains of none of the other awards except that to the Scandinavian American Bank which was a general judgment against the Scandinavian American Building Company for \$232,136.62 and interest in the sum of \$19,136.62, with a rank the same as that of the appellant * * * ." (Olson Company brief, p. 2.)

At page 43 of this brief it also says: "But no other claimants are interested in the matter because they are all either laborers or materialmen, and therefore superior in rank * * *."

But E. E. Davis & Company, which was allowed a contractor's lien of \$30,000 and over *is* interested

in this matter, as its recovery under the security will be proportionately lessened by every other claim which is admitted to the same or superior rank.

The Ben Olson Company's brief, pp. 1 to 47, deals with this attempt to obtain on review the above relief, to which matter E. E. Davis & Company is opposed.

The brief from pp. 47 to 77 is directed to the error of the trial court in refusing to hold that the Scandinavian American Bank and the Scandinavian American Building Company were identical corporations and that the bank was liable for the obligations created in the name of the Building Company, and also to the error of the trial court in giving a general judgment in favor of John P. Duke, Supervisor of Banks of the State of Washington, against the Scandinavian American Building Company for \$232,094.42 and interest. With both of these latter positions, however, this appellant, E. E. Davis & Company, is in accord with Ben Olson Company, as it may be materially affected by this question if the proceeds of the sale of the building are not sufficient to pay all liens.

REFERRING TO THE BEN OLSON CLAIM
THAT IT IS ENTITLED TO A LARGER
JUDGMENT AND TO A MECHAN-
IC'S LIEN.

By referring to the decree (Record p. 514 to p. 516) it will be seen that the trial court found that the Ben Olson Company was entitled to a judgment of \$13,407.43 and interest against the Building Company as damages because of breach of contract on the part of the Building Company. The court also found that the Ben Olson Company under its contract with the Building Company had furnished materials to be installed and used in the construction of the building and had furnished labor in connection with the installation thereof of the value of \$9437.75, and that it had filed a lien therefor,

“but that by reason of the inclusion in said claim of lien of the grossly excessive amounts, and by reason of said defendant's failure to pay the defendant Crane & Company, whereby Crane & Company were required to and did file a claim of lien, establishing the same in this suit, and because the value of the labor performed and material actually furnished to said defendant Scandinavian American Building Company is less than proper offsets and credits thereto, and for want of equity in said claim, it is decreed that defendant Ben Olson Company have no lien whatsoever upon the real property hereinabove described.”

For these overlapping items Crane & Company was allowed in the decree a materialman's lien for over \$16,000 and interest, and \$2,000 attorney's fee (decree, Record p. 503).

While the findings of the lower court in this equity case are not controlling on review, at the same time they will be followed, we take it, unless manifestly erroneous.

Valve Co. vs. Moorehead, 226 Fed. 202;

United States vs. Oil Co., 286 Fed. 481;

Estep vs. Coal Co., 239 Fed. 617;

Semidey vs. Central Coal Co., 239 Fed. 610.

A diligent search of the proofs found at pp. 868 to 934 of the Record are far from showing any such error.

On the contrary, they do show that the greater part of the material for which claim was made was never delivered at the building or on the building premises; some of it never left the workshop of the claimant; much of it was still with Crane & Company, sub-contractors; some delivered to the building premises and afterwards, with the permission of the court, was withdrawn by the claimant. The proofs presented such a maze of items indistinguishable as to delivery, non-delivery, withdrawal and admixture with the Crane & Company articles, as

to make it impossible to determine whether they were lienable or not.

We find nothing in these proofs to present an excuse for or an explanation of the inequity of the duplications, overclaims and excessive charges, for which in part the court below found the claim as entirely unconscionable.

The explanation offered in Ben Olson & Company's brief at page 43 that no other claimants are interested in the matter, and only the Building Company, and that that company was not in a position to make objection, cannot apply to this lien claimant, E. E. Davis & Company, for the reasons above set out.

As to the effect of the nondelivery of the goods at the building or on the building premises, the same rule applies to this claim as to that of the Tacoma Millworks Supply Company, as to which we respectfully refer to the answering brief of McClintic-Marshall Company, appellee, filed in answer to the opening brief of the Tacoma Millworks Supply Company.

But the Ben Olson Company was bound by the waiver of its lien right contained in its contract. This contract of Ben Olson & Company con-

tained the Article XIV. which was in many of the other contracts (Ben Olson & Company brief, p. 15), waiving the right of lien; as an estoppel against which the Ben Olson Company had pleaded and proven fraudulent representations made by the Building Company which materially induced this contractor to sign the contract containing such a waiver clause, the same as was presented in the cases of this appellee, E. E. Davis & Company, the Tacoma Millworks Supply Company, and others.

But the Ben Olson Company is not in a position to urge such an estoppel because it did not rescind the contract, but sought to recover, and was allowed to recover under the contract only.

For the points of law and authorities on this question, we direct the court's attention to the opening briefs filed in this case by *McClintic-Marshall Company*, *E. E. Davis & Company* and *Far West Clay Company*, appellants, vs. *Tacoma Millworks Supply Company* (copies of which brief are served with this upon Ben Olson & Company).

The facts of the Ben Olson & Company claim as affected by this question are as follows:

From the allegations of the Ben Olson Company cross-bill, Articles XVI to XXIII, Record 229

to 302, it is difficult to say whether the pleader is attempting to recover at the reasonable price of the articles and labor, or at the agreed contract price. The same is equally true of its statements in its lien claim at page 320.

Record, pp. 910 to 912, show proofs made on the theory of the contract price and not reasonable value.

At page 914 of the record in answer to a question of the court, counsel for the Ben Olson Company says:

“MR. STILES—I am not going to ask anything for it, but I am going to ask something at the end of this matter, for our reasonable profit on the contract, and to do that, I have to state what would have been required.”

“MR. OAKLEY—I want to make objection on the ground that it is an attempt to take a lien on an item that represents damages for the breach of this contract, which is not recoverable in this action.”

“THE COURT—I have some doubt about it, but I do not want to prejudge it. Objection overruled for the present * * *.”

At page 915, Mr. Stiles says:

“The amounts claimed under the lien and the amounts which it would take to complete the job, including labor and material, total \$81,970.23, which would have been the cost of the job completed to Olson & Company. The contract was for \$90,000.00, and we would have realized

\$8,029.77, which would have been our profit on the job." Also shown on schedule, p. 920.

The trial court evidently did not apprehend that the Ben Olson Company had rescinded its contract, for the judgment which it allowed it was as damages for breach of the contract (decree, Record p. 515), treating the contract as still existing.

As pointed out by the briefs on this question in the cross-appeals of McClintic-Marshall Company and others, hereinabove referred to, one seeking to rescind must do so promptly and decisively, and with definite notice to the other parties. Ben Olson & Company certainly has not complied with these requirements.

The Supreme Court of this state has expressly held that no mechanic's lien can be had for lost profits.

Gray vs. Hicky, 97 Wash. 278.

In this case at page 280 it expressly refers to the *Gould vs. McCormick* case cited and relied upon by the appellant.

The other cases referred to by appellant's counsel (brief, p. 39), *Noyes vs. Pugin* and *Chase vs. Smith*, were both law actions tried before a jury and not equity suits for lien.

We suggest this further reason why the remedy, or measure of recovery, urged by this appellant is not applicable to this case, namely: where a contract is rescinded for breach on the part of the owner by failure to make final payment, the contract may be considered as still existent for the purposes of fixing the measure of recovery at the suit of the party not in default, but where the contract is rescinded for fraud, as was claimed in this case by the appellant, the contract is no longer existent for any purpose. If avoided, it is avoided in toto, and the plaintiff's recovery is only for the value of the benefit that he has rendered the other party, namely, on a *quantum meruit*.

ANSWERING THE BRIEF OF J. P. DUKE AS SUPERVISOR OF BANKS.

Counsel of other lien claimants in this case have presented the law, from the standpoint of the lien claimants, as to the question of priorities between the mortgages claimed by this appellant and the mechanic's lien claimants.

We undertake here only to state the facts relating to the time of the attachment of the lien of E. E.

Davis & Company and these mortgages, if good for any purpose. E. E. Davis & Company commenced work under its contract of steel erection on the 14th day of June, 1920, and continued in the performance of the same thereafter until the 15th day of January, 1921, while the assignment of the mortgage did not occur until October 7, 1920, and no advancements were made on said mortgage until a much later date (brief of J. P. Duke, p. 16).

For the foregoing reasons we therefore respectfully submit on behalf of E. E. Davis & Company, appellee:

That the decree of the trial court should be sustained as against the respective claims of these appellants, which, while they do not attack the validity or amount of the claim of E. E. Davis & Company, yet seek to subordinate it in rank to their demands to the practical elimination of all value in its security.

Respectfully submitted,

JAMES W. REYNOLDS,

*Attorney for E. E. Davis &
Company, Appellee;*

PETERS & POWELL,
Of Counsel.

In The United States Circuit Court of Appeals For The Ninth Circuit

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al., *Appellants,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

TACOMA MILLWORK SUPPLY COMPANY, a Partnership consisting of ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T. DAVIS, Deceased, R. T. DAVIS, Jr., LLOYD DAVIS, HARRY L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A. DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT and ANN DAVIS, *Appellants,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

McCLINTIC-MARSHALL COMPANY, a Corporation, and E. E. DAVIS & CO., a Corporation, and FAR WEST CLAY COMPANY, a Corporation, *Appellants,*

vs.

ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T. DAVIS, Deceased, et al., *Appellees.*

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

BEN OLSON COMPANY, a Corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as successor in office of the defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, Jr., as Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation, *Appellants,*

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees.*

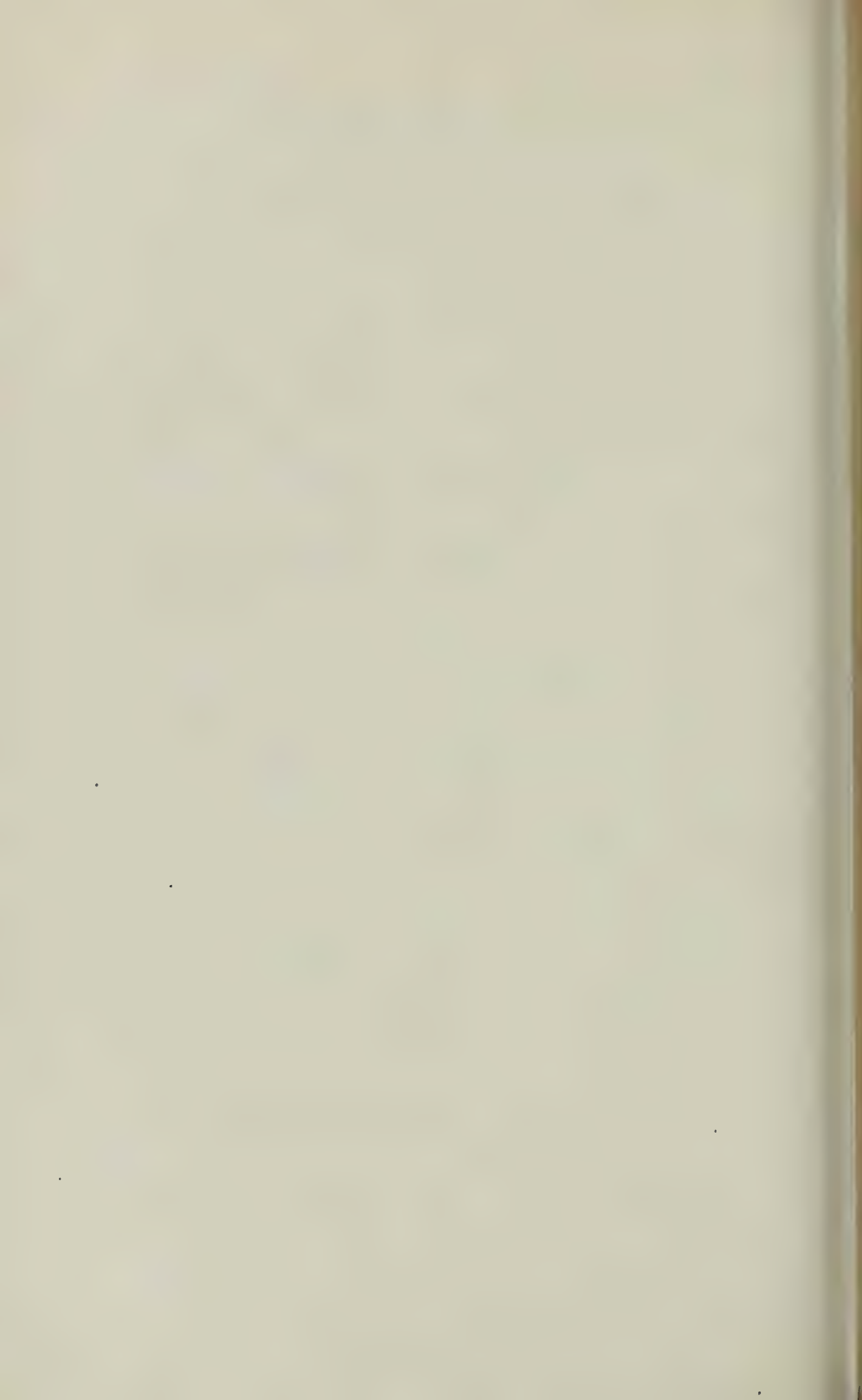
UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT TACOMA MILLWORK SUPPLY
CO. TO BRIEF OF J. P. DUKE, SUPERVISOR.

EDWIN H. FLICK,
CHARLES H. PAUL,

Attorneys for Appellant Tacoma Millwork Supply Company.

913-915 Hoge Building, Seattle, Washington.



**In The United States
Circuit Court of Appeals
For The Ninth Circuit**

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al., *Appellants*,
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vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al., *Appellees*.

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT TACOMA MILLWORK SUPPLY
CO. TO BRIEF OF J. P. DUKE, SUPERVISOR.

We beg respectfully to present to this court a
resume or review of the facts submitted in the

brief of appellant J. P. Duke, as Supervisor, with others.

We have no criticism of the facts contained in the statement of facts excepting as facts were inadvertently omitted or excepting as certain conclusions were drawn from the facts submitted at pages 2 to 36, inclusive, of said brief, to which conclusions we cannot subscribe.

\$70,000.00 MORTGAGE.

It is suggested, page 3 of said brief, that the bank did not assume the mortgage known as the Penn Mutual mortgage, namely, the one of \$70,000.00, so-called, nor did it agree to pay the same. On paper and without looking into the acts or the estoppels created by the parties, this is true.

But there was placed of record, through the act of men who were officers of the bank, with officers of the bank assisting in its construction, another mortgage, being the \$600,000 mortgage, which recites, in so many words, that this is a first mortgage upon the same land covered by the \$70,000.00 mortgage. This mortgage was placed of record subsequent to a warranty deed given by this banking corporation to the building company. (See page 1006-7-8 of Record). The resolutions there found or referred to speak of this warranty deed running in favor of the Building Company. In the

same resolutions reference is made to "a first mortgage for the principal sum of \$600,000.00 to be executed by said Scandinavian-American Building Company upon all three lots." In the same resolutions this court will find that for this warranty deed the bank was to receive \$350,000.00 worth of second mortgage bonds. In the same resolutions is found a reference to the \$70,000.00 Penn Mutual mortgage. The two lots, 11 and 12, and the building thereon, were carried at \$280,000.00 on the books of the company, which was supposedly the net value with the deduction of the \$70,000.00 mortgage, already considered, and for that reason the bank was seeking \$350,000.00 worth of the second mortgage bonds. (See p. 22 Oakley's brief, pp. 738 *et sequor*, Record).

Thus the bank was to eliminate the \$70,000.00 Penn Mutual mortgage through the acceptance of an equivalent amount of second mortgage bonds. The agreement of the bank under these resolutions coupled with the record title when the appellant Millwork Company signed its contract presented practically this situation: That the bank had already purchased Lot 10 from Drury for the building company. This was unaffected by the \$70,000.00 mortgage in any particular. The resolutions, plus the warranty deed, plus the recording of the \$600,000.00 mortgage as a first mortgage is proof

positive that the bank on the adoption of the resolutions knew, and held out to the world, the proposal that the \$600,000.00 mortgage was a first mortgage and that after that would follow immediately the second mortgage bonds, which were to wipe out the interest of the bank in Lots 11 and 12 and to wipe out the Penn Mutual mortgage, *which it was under absolute obligation to wipe out under the warranty deed dated February 25th, 1920, and recorded on the same day.* But the agreement to reserve to itself the protection of a second mortgage lien was never brought to the notice of these appellants nor was it ever placed of record.

The \$600,000.00 mortgage was dated March 10th, 1920, and recorded on the 10th day of March, 1920. Charles Drury, the Chairman of the Board of Directors of the Bank, signed as President of the building company. J. V. Sheldon, Vice-President of the bank, signed this instrument as the Secretary of the building company.

The pertinent part of the resolution referred to adopted by the bank, which speaks of the payment for the lots conveyed by the bank to it, namely, Lots 11 and 12, is as follows:

“Whereas, said Scandinavian American Building Company has agreed to execute and deliver to Scandinavian American Bank of Tacoma second mortgage bonds hereinbefore

referred to of the par value of \$350,000 in payment for said real estate as soon as the same can expediently be prepared and be a second mortgage lien upon said premises, and

“Whereas, temporarily, said Scandinavian American Building Company will execute a certificate or agreement agreeing to so deliver said bonds as soon as the same can be executed as above provided.”

Then follows the “Wherefore” clause, authorizing the president and cashier of the bank to convey the two lots for these bonds. (See pp. 1008-9 of Record).

The \$600,000.00 mortgage recites that the property is, “free and clear of all incumbrances of every nature and kind whatsoever.”

The resolution of the bank recites, as to this \$600,000.00 mortgage that the building company “proposes to borrow \$600,000.00 and execute therefor a first mortgage upon said premises.”

The \$600,000.00 mortgage was to produce a fund for the final completion of the building (Page 26—Appellant’s opening brief). This is what this appellant relied on.

To say in the face of this testimony that the record was unaffected by any other instrument until after failure of the bank and the institution of this action is not a tenable premise. We find

this suggestion on page four of the bank commissioner's brief.

The bank had already received its certificate for the \$350,000.00 worth of second mortgage bonds. Equity, of course, will regard that as done which it was agreed would be done and in the light of the certificate and in the light of the fact that the control of the building company rested with the bank it was through the laches of its own officers that the bonds themselves were not constructed. Therefore it seems only a reasonable rule to apply that the \$70,000.00 mortgage shall be deemed to have been paid off when the certificate passed.

It was not the act of the bank commissioner, acting through Mr. Haskell, that is to be considered as the vital fact in the payment of the \$70,000.00 mortgage.

Merely for the purpose of argument let us assume that Mr. Haskell did not have the authority to pay the \$70,000.00 mortgage. What Mr. Haskell is seeking in this action is the foreclosure of rights under the \$600,000.00 mortgage and is also seeking the foreclosure of the \$70,000.00 mortgage, but the position of the bank commissioner must necessarily be bound by the record obligations of the bank, itself. So far as the \$70,000.00 mortgage is concerned the bank expressly

agreed in its resolutions that it would take second mortgage bonds for this obligation, and it expressly warranted this property free and clear. It is true that it knew that there was to be a \$600,000.00 first mortgage upon the place, but the property was to be free and clear so that the building company could put such a mortgage upon the property.

No record was made in the auditor's office of the plan to put out a second mortgage bond issue. No evidence, so far as this appellant is concerned, is in the record that they were advised that there would be a second mortgage bond issue. They were apprised that the \$600,000.00 mortgage was to be a *first mortgage to be issued for completion monies and not available until the building was completed*. (Record p. 1126). It was also specially represented by officers of the building company, who were also officers of the bank, that there was \$400,000.00 cash on hand.

The bank then stands in this position:

a. That it is seeking to *transmute a warranty deed into a warranty deed subject to a \$70,000.00 mortgage*.

b. That it is seeking to place, behind a mortgage which the warranty deed represents as satisfied, a first lien upon the premises.

c. That while it received and accepted, volun-

tarily, while solvent, a certificate for second mortgage bonds, which was the full consideration for the transfer of Lots 11 and 12 and claiming this \$70,000.00 mortgage, it is now claiming an interest in Lots 11 and 12 and claiming the right to have eked out of this property the \$70,000.00 mortgage. The foreclosure of the \$70,000.00 mortgage is sought (Record p. 84) claiming (Record p. 87) that all other claims asserted in these actions and cross actions were inferior and subsequent to said \$70,000.00 mortgage. At page 89 of the record, *et sequor*, appears the further cause or second cross bill, which speaks of the purchase of the Drury lot at the instance of the building company by the bank for the sum of \$65,000.00; the agreement to transfer Lots 11 and 12 for second mortgage bonds of the amount of \$350,000.00 (Record pp. 90-91) and there is further suggested the fact that the building company failed to execute the second mortgage and to deliver the bonds mentioned, and on page 92, paragraph IV of said cross bill speaks of the right in equity to a lien in the nature of a purchase money mortgage on said premises and suggests, on page 94, that the claims of other lienors or claimants are inferior and subsequent.

For a third cross bill, beginning at page 94 of record, this cross complaint speaks of the \$600,000.00, of its assignment to the bank, and

suggests the advance of \$432,822.99 to the building company between June 25th, 1920, and January 15th, 1921, seeks the foreclosure of said \$600,000.00 mortgage as collateral security for said advances. (Record p. 100). Claims that the interest of the remaining parties is inferior. (Record p. 103). Curiously, in the last total is included the stock purchase of \$200,000.00 June 25th, 1920. Somewhere in this total amount must be found the \$65,000.00 paid for the Drury lot, and as already shown in the opening brief. The only new money given after assignment was approximately \$50,000.00, which again is reducible by over-drafts mentioned.

d. It is seeking to transmute a stock purchase, known, as Larson says, to practically all of the directors of the bank, being the total capitalization of the building company in the amount of \$200,000.00, to a loan secured by a \$600,000.00 first mortgage, and yet this amount was never carried as a loan until December 30th, 1920, (Record p. 1114) after the bank commissioner had directed, undoubtedly, such change, and no note of any kind was given up for entry representing this as a loan. (Record p. 1118).

e. It is seeking to displace the warranty of \$400,000.00 cash on hand given to these contractors by officers of the building company, who were also

officers of the bank, which representations gave the builders security, by wedging in a mortgage security to cover the advances that the officers of the bank, operating for and with the building company, knew must stand for the representation that there was \$400,000.00 cash on hand, since there was not one cent of cash on hand.

f. This bank is now taking to itself for the advances just mentioned, collateral security of this \$600,000.00 mortgage, which was represented to the lien claimants, *would be held as completion monies*, and use this security for the advances claimed to have been made, even for the return of the purchase of the stock, in violation of the representative promises that there was \$400,000.00 cash on hand, which, plus the \$600,000.00 of completion monies, would practically finish the building so that no contractor need worry. Upon the faith of representations, made by the officers of the building company and the bank, who were, in effect, the active forces in both institutions, and, in effect, solely in control of both institutions, so far as executive work was concerned, these contractors went to work.

The bank, acting through the bank commissioner, is, therefore, violating the promises of *sole agents of both institutions*, that there were ample funds on hand, coupled with what would be produced

with the first mortgage, by attempting to use the first mortgage and the very ground upon which it rests as security to itself *to the disinterest of those receiving favorable promises through its officers*, who had full charge of all matters relating to the building company and to the bank, and as one of them expressed it: "Drury had the active charge of the building company (he was Chairman of the Board of Directors of the Bank) and that everything was left to Larson and he was the President of the bank", and as one reads the evidence, fostered the building project, engineered the loan for it and was the dominating spirit in all these troublesome matters.

g. The bank is now claiming the assignment of this \$600,000.00 mortgage so that it might be collateralized for advances, or for advances already made. Mr. Larson says this was not the case; that Simpson was sick and that it was for that reason that the assignment was sought under the advice of the attorney for the bank, Finck, in Chicago (Record p. 1048). Larson says that he did not want to get the mortgage tangled up with his (Simpson's) estate. *Mr. Larson then says the \$600,000.00 mortgage assignment was not taken with any idea of security or preference whatever.* (Record p. 1085. See also p. 554 of S. of F.). In another part of the record he rather recedes from

this position, but it will be conceded that a majority of the directors of the building company did not know of this assignment.

It was suggested in one part of Mr. Oakley's brief (page 15) that the testimony showed that when the \$600,000.00 mortgage was arranged for it was understood that that would take up the \$70,000.00 Penn-Mutual mortgage (Record p. 1045. S. of F. 545). While this language is used it is perfectly clear from the resolutions that the \$350,000.00 second mortgage bond issue was to take up the \$70,000.00 mortgage. (See p. 1106 of Record where Mr. Larson says, "The building company was to pay \$350,000.00 for the property and *the bank was to pay the mortgage that was on it and release it*"). The letter to Mr. Chilberg (Record p. 1059) mathematically shows this. At page 545 of the statement of facts Mr. Larson says, "Either the \$70,000.00 was to be taken out of the \$600,000.00 mortgage or the bank would have to pay it", but when the resolutions were finally drawn clearly the \$70,000.00 was to be taken care of in the second mortgage bonds. (See also p. 554 S. of F.) It is clear, therefore, that the \$600,000.00 mortgage was not to be collateral with the bank for its advances, but was to be reserved for the Metropolitan money, to be used in final completion of the building. In addition this appellant had no knowl-

edge of the agreement to take back second mortgage bonds.

THE \$200,000.00 STOCK PURCHASE. WAS IT A
PURCHASE OR A LOAN?

The records of the company, Exhibit 195, show O. S. Larson as the owner of 1996 shares of the capital stock of the building company. Chas. Drury, president, and J. V. Sheldon, secretary, certify to this, under date of June 25th, 1920. Under the same date the same officers certify that the Scandinavian American Bank is the owner of apparently the same block of stock. *Mr. Larson testified that he immediately transferred his certificate, when he got it, to the bank.* Mr. Sharpe indicates (Record p. 1114) that it was a purchase *and that no loan note ever appeared on the books* and no entry of any kind suggesting this until December 30th, 1921. Exhibit 190 (Record pp. 1034-1035) shows this as a purchase, being listed under "Stocks and Securities" in the bank accounts. Mr. Ogden, the cashier, says that *the bank records show that this is a purchase*, but later the bank charged interest on the money it bought the stock with (Record p. 1033). Mr. Larson says he subscribed for the stock in behalf of the bank. *That the certificates marked Exhibit 195 are all in Mr. Freeman's handwriting, Mr. Freeman being a*

partner of Mr. Williamson, a director, (Record pp. 1042-1044). At page 1092 of Record Mr. Larson says, "I admit buying the stock and I want to say that the *Board of Directors knew all about it*. It was passed on by Mr. Williamson as being perfectly legal and above board in every respect. *They never* objected to it and they knew all about it. * * * The matter was brought up at a meeting of the board * * * in April and again in December, 1920, and very thoroughly discussed and understood."

WERE THE TWO CORPORATIONS IDENTICAL OR WERE
THE MANAGING OFFICERS OF THE TWO
CORPORATIONS IDENTICAL?

The directors of the bank were also the directors of the building company. Larson was the active spirit in the bank, assisted by Drury, and Larson managed the affairs of the building company, assisted by Sheldon, vice president and director of the bank, and Ogden, cashier of the bank and treasurer of the building company (Record p. 1042. See page 8 of opening brief).

The directors were practically identical, and those directors who handled the business of the bank in large substance, were also directors who were in any sense active at all in the building

company. These were Larson, Drury and Lindeberg and Williamson.

RELIANCE ON TITLE

It is suggested that none of the lien claimants testified that they relied upon any warranted title to the property. It would appear, however, that under the representations made such reliance is either expressly stated or thoroughly implied.

R. T. Davis says that he relied upon the representations that the \$600,000.00 mortgage was definitely financed (Record p. 700). This would, of course, mean that this was a \$600,000.00 first mortgage.

George Davis says that this representation was definitely made to him, that the \$600,000.00 would be a first mortgage on the property (Record p. 729), that the building company was the full owner of the property with nothing against it except this mortgage (opening brief p 28).

Before leaving the fact side of this brief I think we ought to suggest once more to this court that Mr. Wells, the superintendent of the building, duly authorized in the premises, accepted this material in both warehouses. That it was specially fabricated and was useless elsewhere, and was again tendered to the receiver on his appointment and refused, and that offer was made to the trial court that it enter an order classifying this material as

part of the building, which offer was not acted upon. In the light of the foregoing statement the following language in the earliest case on the subject in Washington, namely, *Fox v. Utter*, 6 Wash. 301, is peculiarly applicable:

“Time must have been made the essence of the contract to avoid this rule, if the reason for refusal to receive is based on the lateness of delivery. And if upon tender of the article, the purchaser allege defects of construction or departure from the contract he must point them out, and give the maker a chance to remedy the difficulty. This is especially so where a peculiar article has been made according to a design of the purchaser, and will be of less or no value to others. This contract was one for labor rather than of sale. *Davis v. Downs*, 4 Mich. 530; *Bement v. Smith*, 15 Wend. 493.”

The language ‘this is especially so where a peculiar article has been made according to a design of the purchaser and will be of less or no value to others’ was moulded to fit a case of special interior fabrication. This was a case where a monument was made and it was held that if there was opportunity to accept or reject, the law, in effect, would presume an acceptance.

Again we find the following expression in the

same case:

“In cases of the manufacture of specific articles upon order a tender of the manufactured articles is sufficient.”

This was the reply of the Supreme Court to the claim that no deliveries could be found unless there was first found to be an acceptance by the party to whom delivery was to be made.

WAS \$600,000.00 MORTGAGE TO BE USED AS
COLLATERAL?

We submit also this, in response to certain statements made, pages 30-31 and 32 of Supervisor's Brief, relating to the purpose of placing the \$600,000.00 mortgage at Simpson's disposal.

We submit the fact that the building company secretly intended to use this mortgage as collateral, and did so, or that it secretly arranged with Simpson to obtain interim monies under this mortgage and would not aid the bank in its pretended position of bona fide holder of this mortgage for collateral purposes because its officers, who solely directed its policies, Larson and Drury, had represented to the two Davis brothers, the manager and assistant manager of the appellant company, that this mortgage was to be preserved to produce completion monies and that the building company had on hand \$400,000.00 in cash, and to prove it told Davis to come

down in the morning and get \$15,000.00, which he did (Record p. 695). That Davis gave a note for \$15,000.00 and each time the note was renewed Larson agreed that it was to be taken out of the last estimate due on the building although the note ran to the bank. The writings between the bank and the Metropolitan Insurance Company relating to interim funds and its secret handling of this special \$600,000.00 mortgage could not affect this appellant in the circumstances.

It is suggested that this mortgage and the entry carried in connection therewith were held as a real estate loan, citing pages 1026-1030 of Record, Exhibits 185-187-188, but Exhibit 185, for the first time, expresses a real estate transaction under date of December 9th, 1920; Exhibit 187 expresses a real estate loan under date of December 9th, 1920, and Exhibit 188 expresses the interest on this supposed loan December 31st, 1920. This last exhibit shows a total of \$9,133.25 and is the interest on the capital stock purchase, now called the loan, the interest on the Drury lot purchase, again called the loan, and the interest on \$350,000.00. All these transactions were transmuted from direct sales or purchases into a loan status, we are satisfied, at or subsequent to the last examination by the bank examiner.

Sharpe, in his testimony already submitted, could

not find them as loans, but found them in their true status as originally entered; the stock a direct purchase by the bank, the Drury lot purchased by the bank for the building company and the \$350,000.00 transaction, the second mortgage bonds, representing the sale of lots 11 and 12 *with the Penn-Mutual mortgage, in effect, paid.*

Under the heading, "The Bank Commission was not a agent of the bank," and the headings following down through to page 106 of the Supervisor's Brief, we deal with the validity, in effect, of the \$70,000.00 first mortgage and the principal argument, we deem, is made in this premise to the effect that the bank commissioner had no power to pay this mortgage.

If a bank has made a valid contract then, of course, it would be futile to say that the commissioner could break such contract and change the status of parties who had relied upon the fulfillment of this contract. The lien claimants relied upon the fact that there was no other mortgage to remain upon this property except the \$600,000.00 mortgage. The bank records show such an agreement. The commissioner simply carried out the obligation of the bank under its warranty deed to clear this property of any incumbrances. This appellant, at least, relied upon the fact that this property was free and clear, excepting for the com-

pletion money mortgage. It is for this reason that the authorities submitted by Mr. Oakley, we believe, are not in point.

This appellant acted upon the assurance given as to title and would now be severely jeopardized if this \$70,000.00 mortgage was re-established.

We have already dealt with the question of the purpose of the \$600,000.00 mortgage and its validity. This is treated at pages 106 *et sequor* of the Supervisor's Brief. Here, again, there can be no contention as to the validity of a mortgage securing future advances, but in this case this appellant, at least, was assured that the \$600,000.00 mortgage was to be preserved to furnish completion monies, that is, to pay the final \$600,000.00 due on the building, supplementing the representation that the building company had \$400,000.00 cash on hand for immediate use, or what one might term the interim monies. Thus, the authorities on future advances would not apply since it was the representation that was relied upon that this fund would be kept for final completion of the building (Record pp. 695-697-700-706).

On page 157 of the Supervisor's Brief we find the question argued as to whether the bank is entitled to a purchase money mortgage. Here again we have nothing to apprise the lienors of a claim to \$350,000.00 either as a vendor's lien or as a

second mortgage lien. The bank agreed to take \$350,000.00 of second mortgage bonds. It did not disclose this purpose to this appellant, at least, but put of record a full warranty deed which had the effect of obliterating the \$70,000.00 mortgage. Relying, therefore, upon the status of the title as so represented, this appellant had a right to rely upon \$400,000.00 of cash; \$600,000.00 to be kept carefully as a completion fund with full title in the building company. It did so rely. (Record pp. 703-705. See also particularly pages 695 and 700 of Record.)

Respectfully submitted,

EDWIN H. FLICK,

CHARLES H. PAUL.

No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, JR., as special Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, FAR WEST CLAY CO., et al.,

Appellees.

REPLY BRIEF OF J. P. DUKE, ETC.

F. D. OAKLEY,
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1005 Rust Bldg., Tacoma, Wash.

Filed this.....day of March, 1923

FRANK D. MONCKTON, Clerk

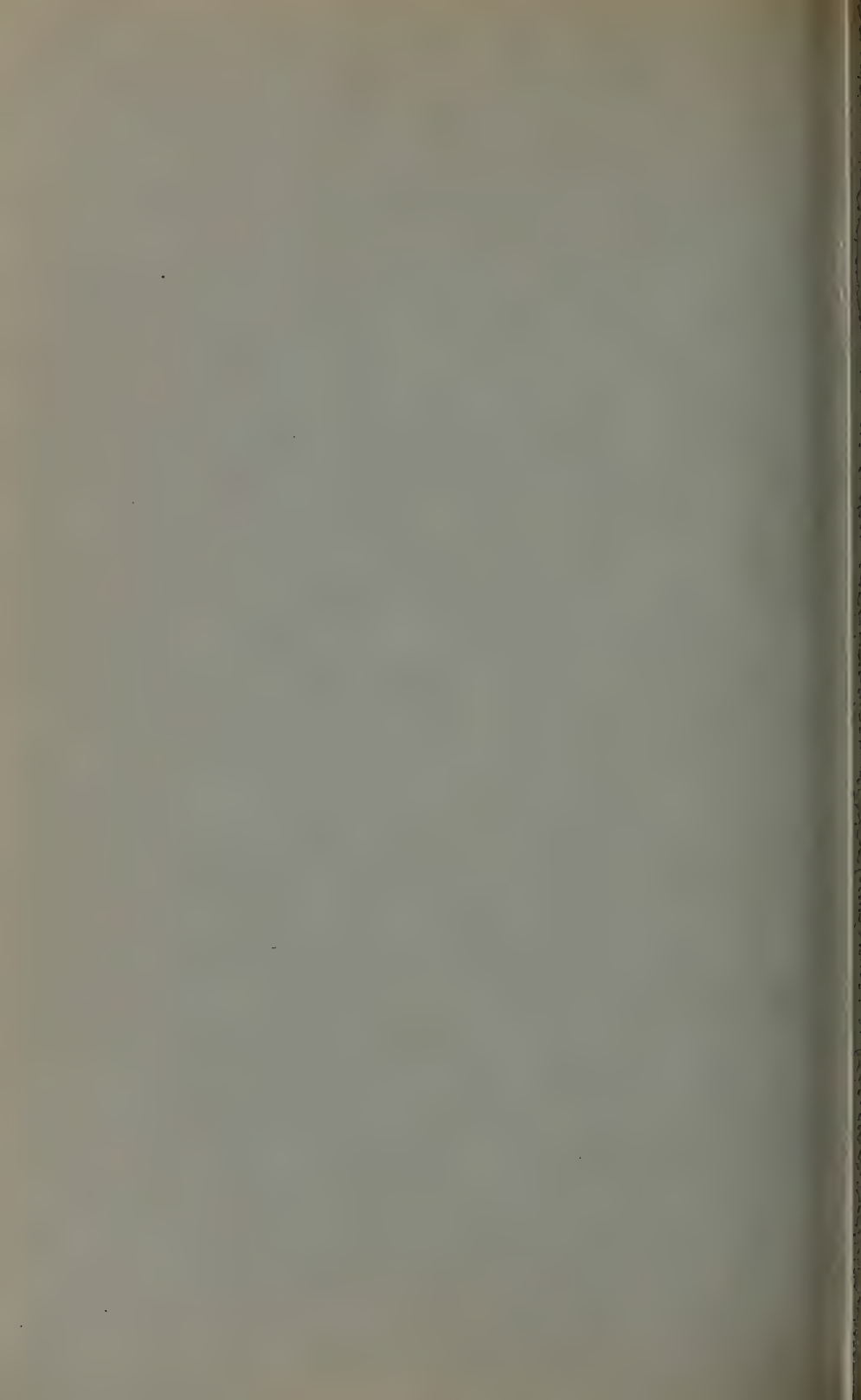
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F. D. MONCKTON,

CLERK



No. 3953

IN THE

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J. P. DUKE, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, JR., as special Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation,

Appellants,

VS.

McCLINTIC-MARSHALL COMPANY, a Corporation, FAR WEST CLAY CO., et al.,

Appellees.

REPLY BRIEF OF J. P. DUKE, ETC.

As we shall specifically point out to the Court, we cannot agree with the statements which purport to be statements of fact, as contained in the brief of the Appellees, Far West Clay Company, et al. Assuming however, that all of the purported facts therein set forth are true, the Court is confronted with this situation, (we italicize the statements which we do not think are supported by the evidence):

The Scandinavian American Bank was the owner of two lots subject to a seventy thousand dollar mortgage, which mortgage was owned by the Penn Mutual Life Insurance Company, *which it was legally obliged to pay*, but which would not be due until September 1, 1920. In February, 1920, it deeded these lots to the Scandinavian American Building Company, *and expressly agreed with the grantee to pay this mortgage when due*; in consideration of which the grantee agreed to deliver to the bank before June 10, 1920, second mortgage bonds of the par value of three hundred and fifty thousand dollars, secured by a mortgage covering the property so deeded. The bonds were not delivered by the grantee and the mortgage was not paid by the bank. The grantee in attempting to build on the property incurred large debts of a lienable nature for which liens were filed against its interest in the real property, after which both the bank and the building company become insolvent.

Under these facts what are the rights:

First, of the holder of the mortgage?

Second, of the creditors of the building company?

Third, of the creditors of the bank?

In the hands of the Penn Mutual Life Insurance Co. this mortgage was superior to all liens. If the bank was personally liable for the debt, the Penn Mutual could enforce its mortgage against the

property and file a claim against the assets of the bank for the deficiency—if any; or, it could waive its mortgage and file its claim as a general creditor of the bank. If it did this, it would be required to surrender its mortgage to the Supervisor for the benefit of all of the creditors of the bank, and the Supervisor would thereupon hold the mortgage for the benefit of all of the creditors of the bank in exactly the same status as it existed in the hands of the Penn Mutual.

If the Supervisor, whether rightfully or wrongfully, believes that it will be for the best interest of the creditors whom he represents for him to buy an assignment of this mortgage and to hold it and assert it for their interests, in what way is the status of affairs changed? In the hands of the Penn Mutual it was prior to the liens; in the hands of the Supervisor it is prior thereto, he having all the rights which the Penn Mutual had.

What rights have the creditors of the building company?—the right to take an assignment of the mortgage and thereby become possessed of the rights of the Penn Mutual, if they so desire. If the bank had agreed with the building company to pay this mortgage—as they assert—could they demand that the Supervisor pay it forthwith? No, because by so doing he would be preferring them to the other creditors of the bank. The Receiver of the building company would be entitled to file a claim with the Supervisor for the breach of the contract,

and the measure of his claim for damages would be the \$70,000.00 and interest. If this claim were rejected by the Supervisor he would have to sue to establish it. Now, would any American Court hold, in that event, that the Supervisor would be ordered to allow the Receiver his claim, and that he could not offset as against the claim the building company's breach of the contract by which it obtained title;—or that he could not offset money actually loaned to the building company, totaling nearly \$500.000., and evidenced by promissory notes?

The bank being one of the creditors of the building company, the Supervisor, as representing the creditors of the bank and having a claim as such against the receiver of the building company, would have the same right that the other creditors of the building company would have, namely, to take an assignment of the mortgage, and thereby become subrogated to the rights which the Penn Mutual had. Now, is that right taken away from him by reason of the fact—if it be a fact—that the bank had agreed with the building company to pay the mortgage? Certainly not—because even if there were no offset to this obligation, the creditors of the building company could not force the Supervisor to pay it and thus prefer them over the other creditors of the bank.

It seems to us that all of these propositions are elementary. We do not believe that anyone will

contend that in the hands of the Penn Mutual this mortgage could not be enforced and that it would not be superior to all the liens. It is elementary that the assignee or endorsee of a negotiable instrument thereby acquires the rights of the assignor or endorser and if he be entitled to enforce the same, defenses which could not be made as against him, cannot be made against the assignee or endorsee.

The money used to purchase this assignment was a trust fund in the hands of the Supervisor which it was his duty to distribute pro rata to *all* of the creditors of the bank. It was not the money of the bank or of the stockholders of the bank, for under our law the Supervisor does not represent either the bank or its stockholders. Even if the Supervisor desired, would a court of equity permit him to do so manipulate this transaction as to make it a preference, whereby the creditors of the building company, who would be mere general creditors of the bank to the extent of \$70,000.00 (if we assume that the bank agreed to pay the mortgage and there was no offset) were paid in full to the detriment of the other general creditors of the bank? We do not believe anyone will contend that the Supervisor has the legal right to prefer one general creditor to another. Yet stripped of all its verbage that is the argument of the appellees—not only that the Supervisor could prefer them, but that he was under a legal obligation to prefer them, and the Court will not permit him to say that he

did not prefer them, but will make him prefer them whether he wills it or no.

And as to the offset to this claim (if we assume that the bank agreed to pay this mortgage) the Supervisor could not legally waive these. He could not have allowed the claim of the receiver of the building company for \$70,000.00, when by the terms of the very transaction out of which that claim arose, the building company became indebted to the bank in the sum of \$350,000.00, or if, as appellees assert, the \$70,000.00 is included in the \$350,000.00 in the sum of \$270,000.00. The appellees admit in their brief that the consideration for the agreement of the bank to pay the mortgage was the agreement of the building company to deliver to the bank \$350,000.00 of second mortgage bonds. If that be true, we submit it is conclusive, and if, for any reason, legal or equitable, this could not be offset, there were numerous promissory notes aggregating over \$200,000.00, which certainly could have been offset. In fact the finding of the District Court was to the effect that the bank had "advanced to and for the benefit of" the building company money aggregating \$232,094.42. (Tr. 524-525.) If, therefore, the Supervisor had attempted to allow this claim for \$70,000.00 for breach of contract, any person interested in the assets of the bank could have enjoined the Supervisor from paying dividends thereon, and no court with knowledge of the facts would have permitted him to pay

dividends thereon, even if no one objected.

So that, as we view the facts, it makes no difference whether or not this mortgage was the personal obligation of the bank or whether or not the bank did agree with the building company to pay it. In fact, however, it was not the personal obligation of the bank. The Chilbergs, the bank and the Penn Mutual entered into a written contract wherein it is expressly stated that the bank was not liable on the mortgage debt and that the only personal obligation was that of the Chilbergs. (Ex. 327 Tr. at p. 1208-9.) It seems to us, therefore, that it is utter nonsense for the appellees to argue that this mortgage was the personal obligation of the bank, or that if Chilberg had been sued upon this personal obligation he could have claimed: "that it was not his debt, but that it was the debt of the bank," as stated on page 40 of their brief.

It is stated constantly throughout appellees' brief that the bank expressly agreed with the building company to pay this mortgage and that the amount of the mortgage was included in the purchase price. The bank had been carrying these lots at \$280,000.00. It had paid Drury \$65,000.00 for Lot 10, the adjoining lot, and Drury had conveyed this lot to the building company. This \$65,000.00 was not carried as a loan. There was no written obligation in the bank's records anywhere whereby the building company became obligated to repay the bank this \$65,000.00, except in the sum

of \$350,000.00. These two items total \$345,000.00. The building company had four months within which to deliver the bonds, and three months' interest on \$345,000.00 would amount to \$5,000.00. So that unless the bank was to be repaid this \$65,000.00 by these second mortgage bonds there was nothing anywhere in the bank's records to balance the expenditure of \$65,000.00 for the Drury lot. In fact, as we understand it, the appellees concede that this \$65,000.00 item was included in the \$350,000.00 purchase money item. (Brief p. 5.) If it was included in the purchase money, it of necessity excluded the \$70,000.00, unless the Court is going to believe that this property which the bank was carrying on its books for \$270,000.00 was to be sold to the building company for \$200,000.00. Added to this, the written contract between the bank and the building company (Ex 184 Tr. 1020-1-1) recites that the property is "encumbered by a mortgage" for \$70,000.00, and that the building company proposed to buy the property for \$350,000.00. We, therefore, submit that except as an agreement on the part of the bank to pay this mortgage may be impliedly contained in the warranty deed, there is no agreement on the part of the bank to pay the mortgage, and the facts all show that the bank was not to pay it.

Much stress is laid by Appellees on the fact that Larson took a check east in September to pay this mortgage, but persuaded the Penn Mutual to

extend the payment thereof. It is significant, however, that Larson told the mortgagee's officers "that we needed the money *until we could get the money from the Metropolitan.*" (Tr. 1045.) This very clearly corroborates what Larson had just stated, namely, that the \$70,000.00 mortgage was to be paid by the building company out of the proceeds of the Metropolitan mortgage. No entry at all of this was made upon the bank's books, so that how Larson would have ordered the bank's clerks to charge it if it had been used, is entirely problematical. In view of Larson's conduct, as shown by the evidence, we submit that the taking of this check shows nothing. Whenever the building company needed money Larson in some way or another, so arranged things that the bank's money became available to the building company. So that the fact that Larson in this instance took the bank's money with which to pay this mortgage, shows nothing.

Appellees state that this building project was a "scheme of the bank"; that the building company was incorporated by the bank, so that the bank might illegally invest an amount equal to its entire capital stock, as thereafter increased, in the building in order to provide permanent quarters for the bank. There is nothing in the evidence directly or indirectly to justify these statements. The evidence conclusively shows that the bank was to have merely a lease of the banking rooms, (Ex 184 Tr. 1022); that the scheme was the scheme of

Larson, who owned practically all of the capital stock of the building company, and that the other directors of the bank consented to the arrangement only upon Larson's assurances that the building company would buy the lots from the bank, erect a building and operate it, and that not one cent of the bank's money would be invested in it.

It is true that Mr. Larson stated that he had Simpson assign the \$600,000.00 to the bank because Simpson was ill, but we submit that Larson's own testimony shows this to be untrue, because at the same time he says that Simpson went from Philadelphia to Chicago with him for the purpose of having this assignment drawn, which is nonsense; and his telegrams to Sheldon while in Chicago with Simpson show that Simpson was leaving to go to Massachusetts in an endeavor to borrow money on this mortgage. (Ex. 346, Tr. p. 1228.) On the other hand Sheldon, the secretary of the building company and the vice president of the bank, testified that he gave this note and mortgage to Larson for the express and agreed purpose of having an assignment of it made to the bank as its security, (Tr. 1154) and in this he is corroborated by the written evidence. (Ex. 248, Tr. 1155.) Appellees statement that "when or how or with whom this idea originated" is not shown, is, therefore, a mistake, as is also the statement that the building company as such did not consent to it. Sheldon says that this was talked over at that time with Drury, the presi-

dent of the building company; he, the secretary of the building company, delivered the documents and took a receipt therefor, (Ex. 348), and Larson, the owner of nearly all of the stock of the building company, got the assignment.

Appellees say that this would destroy the value of the mortgage for the purpose for which it was given. Why? As we view the evidence this was the very purpose for which the mortgage was given to Simpson. We believe appellees will admit that the mortgage ran to Simpson rather than to the Metropolitan in order that Simpson might use it as a pledge to secure funds pending the completion of the building. Why, then, should the bank be precluded from advancing these funds rather than someone else? The Metropolitan even suggested this in June: "with our committment and our mortgage of record, I should think you could arrange to finance the matter with your own funds". (Ex. 214, Tr. 1080.) While it is true that at the time the mortgage was executed it was not intended that the mortgage should be assigned to the bank or that the bank should advance money on it, it is equally true that the persons to whom it was to be assigned and who were to advance money were not known. If, for instance, Strauss & Company had advanced \$600,000.00 and taken an assignment of this mortgage in July or August as the evidence shows Simpson was endeavoring to get them to do, we believe no one would contend

that the mortgage was invalid and was not prior to the lien,—by what process of reasoning does it become invalid in the hands of the bank which did the same thing?

Appellees statements of the facts throughout their brief are inconsistent with themselves. They state that it was the failure of the bank to pay the \$70,000.00 which caused the building company to breach its agreement to deliver the second mortgage bonds, and that by mutual consent the bond issue was abandoned, yet they claim that the bank's advances were to be paid out of the bond issue. Probably the evidence would warrant the inference that the two \$25,000.00 loans of March and April, 1920, were expected to be paid out of the bond issue, because it was in February or early March that Simpson told these people that he had the entire bond issue placed and that the money thereon would be forthcoming as soon as the bonds were executed and delivered. (Tr. 1018.) But as early as June 5th Larson knew this was untrue because he was then attempting to get the Metropolitan to make advances on the \$600,000.00 mortgage.

Appellees state their objections to the \$70,000.00 under four heads.

(1) That the debt secured thereby was in form Chilberg's debt, but in fact the debt of the bank, "and the bank was under a legal obligation to pay it".

This contention is entirely answered by the written contract of all of the parties, which has not been attacked for fraud or mistake (Ex 327, Tr. 1204) which provides:

“It being understood, however, that the Scandinavian American Bank of Tacoma does not itself assume any personal obligation to pay the indebtedness secured by the mortgage, the only personal obligation to pay said mortgage being the personal obligation of J. E. Chilberg and Anna Chilberg, his wife.”

This contract is signed by the Chilbergs, by the bank and by the Penn Mutual, under the seal of the two corporations, was acknowledged before notaries public and placed of record with the Auditor of Pierce County, Washington, in 1915.

On practically every page of their brief the appellees make the statement that the bank expressly agreed to pay the \$70,000.00 mortgage. No attempt is made to point out the instrument in which this express agreement is embodied, and we submit with confidence that there is no such instrument in the record. Appellees evidently believe that constant repetition of this assertion may lead the Court to accept it as a conceded fact. We will not attempt to match appellees by making an equal number of statements to the effect that this is not true. It may be that there was an implied agreement to this effect because the lots were con-

veyed by warranty deed, but that is by virtue of the fact that the legislature has seen fit to enact that the use of the words "grant and convey" in a conveyance impliedly means that the grantor warrants against encumbrances. In this case, however, the very contract whereby the bank agreed to convey the property to the building company "by warranty deed" recites that the property was encumbered by the \$70,000.00 mortgage and that the building company had offered \$350,000.00 for it, and the facts show that the building company would owe the bank the \$350,000.00 for this property and the Drury lot by the time the building company was to make the payment.

(2) The second proposition is that when the lots were sold the \$70,000.00 mortgage was added to the purchase price and included in it and that the bank having expressly agreed to pay the mortgage "*the bank and hence Duke*" could not pay it and hold it "*against the intervening rights and equities of others.*"

In other words, the owner of a piece of property worth \$350,000.00, encumbered by a \$70,000.00 mortgage due in six months, who conveys the property to a grantee and agrees to pay the mortgage, in consideration of which the grantee agrees to pay \$350,000.00 in four months, could not take an assignment of the mortgage after it became due and after the grantee had defaulted in its

contract to pay for the conveyance of the property. It seems to us that the bare statement of these facts is a complete answer to this contention. That under such circumstances no one should contend that the mortgage as between the grantor and grantee could not be enforced. What greater "intervening rights and equities" would the creditors of the building company have than the building company itself would have? This mortgage was of record at all times and it is elementary that the lien of the lienor is against the right, title and interest of the owner, and that he can have no greater estate than the owner has.

The argument seems to be advanced that the lienors were entitled to rely on the bank's warranty deed and thus are in a position to defeat the mortgage in the hands of the Supervisor. This is certainly a novelty. It would mean that a man who contracted with an owner to furnish lumber thereby acquired greater rights in the land than the owner had. This, of course, is not the law, but is contrary to all law.

Let us assume, however, that had the bank paid this mortgage when it became due and taken an assignment of it, while the bank was a going concern and solvent, and that under these circumstances the creditors of the building company by reason of some alleged equities would have been entitled to have the same cancelled of record as against the bank, we will admit that if these facts

be assumed, and the bank then became insolvent, the title to this mortgage vesting in the Supervisor by operation of law, would, in his hands, be subject to all valid, existing, outstanding, legal and equitable rights, and that the Supervisor could not enforce it. Appellees cite many cases to this effect. That is the law, we have never questioned it. But this does not apply to the facts of this case. The bank never had any title to this mortgage. The Supervisor acquired it, not by operation of law and by virtue of his office, but by the payment to the Penn Mutual of \$70,000.00 in cash out of trust funds in his hands. The money that he used belonged not to the bank, or the stockholders of the bank, but was a trust fund in his hands for the benefit of the creditors of the bank. And even if we assume that the creditors of the building company were the creditors of the bank, this fund did not belong to that one class of creditors but to *all the creditors of the bank*. If, therefore, *after his appointment*, he converts this trust fund from the form of cash in his hands into the form of an obligation to pay money, he is entitled to assert it for the benefit of *all the creditors of the bank*, and would not be permitted by the courts to apply it so as to prefer one class of general creditors to another class of general creditors.

(3) Appellees' third proposition is that because of the warranty deed "*the bank and hence Duke*" could not assert the mortgage "*in violation of the*

warranty against intervening rights and equities". This is the same as appellees' second proposition except that the implied agreement to pay the mortgage is the reason advanced rather than the alleged express agreement to pay it.

In this connection, however, the appellees state that had Duke not paid the mortgage "and if, by reason of its foreclosure the building company lost its property, it would have a claim against the bank for damages *"in a very large sum."* We wonder when the law of damages was changed, and the measure of damages for breach of a covenant against encumbrances became the value of the property plus "intervening rights and equities".

This suggests a very pertinent query—(assuming that the bank's warranty deed was not intended by both parties merely to convey the bank's equity in the property, as we contend) how can the warranty deed be construed into a covenant or agreement to pay the mortgage? This warranty was breached the moment the deed was delivered. At that moment the building company had a cause of action against the bank for the breach, and did not have to wait until the mortgage was due or an attempt made to foreclose it, unless there was some agreement express or implied with regard thereto. The facts conclusively show that this was not the intention. Both the bank and the building company knew of this mortgage. It was mentioned in the very agreement whereby the bank

agreed to give the deed. Had the building company sued for this breach, it would, therefore, have taken only very slight circumstances for the court to have held that this warranty was a mutual mistake and that the building company took subject to the mortgage. Besides Larson's testimony that the money to pay this mortgage was to be taken from the Metropolitan mortgage by the building company, we have the circumstance that the amount the building company agreed to pay was merely the value of the land, *subject to the mortgage*, plus the cost price of the Drury lot, and the further circumstance that the building company had four months within which to pay, and even then was not compelled to pay in cash, but in second mortgage bonds.

(4) Appellees' fourth proposition is that the \$70,000.00 is included in the \$350,000.00, which the building company agreed to pay for this property, that we have asserted both the \$70,000.00 and the \$350,000.00 claim, and that we are, therefore, affirming the contract and repudiating it at the same time. We cannot follow this reasoning. If the contract whereby the building company agreed to pay \$350,000.00 for the property contained a clause that the bank would pay the mortgage, this fourth proposition might be founded on the facts. The weakness of this proposition is that the contract (and no other contract for that matter) contained no such agreement. Even if there were a contemporaneous or subsequent oral agreement

to this effect, or another written contract to that effect, this agreement or contract would merely be a defense *pro tanto* to the \$350,000.00 claim.

As we have said, however, the facts conclusively show that this \$70,000.00 mortgage was not included in the \$350,000.00 consideration. As we see it the appellees virtually admit this when they state that the \$350,000.00 included the Drury lot, which it did. There is no question but that the bank valued its equity in the property at \$270,000.00. That is the value at which it was carried on its books and reports.

Appellees then regail the court with their conception of the reasons actuating the Supervisor when he bought the assignment of the mortgage, one of which is that we have mentioned, namely, that if he did not pay it, and it was foreclosed, the estate in his hands would have become liable for "damages in a very large sum".

We think the Supervisor's reasons are disclosed by the record. He had in his hands a \$600,000.00 mortgage—all of the records of the bank showed that this was held as collateral security for debts due from the building company totaling nearly \$750,000.00; and if this Court holds that that mortgage is not security for these debts, it will be by virtue of the oral testimony of Larson, disputed by the oral testimony of every other officer and clerk of the bank, and by the written records of the bank,

some of which were made by Larson himself. He, therefore, bought this \$70,000.00 mortgage to prevent its assertion as against the \$600,000.00 mortgage, to prevent the collection of 12% interest on it, as its terms provided, and to save the costs as far as the \$600,000.00 mortgage and the estate in his hands, were concerned. There was nothing indirect or hidden in these motives. They were stated in his petition to the court as noted by the appellees in their brief at page 11. There is, therefore, absolutely, no foundation for the argument that Duke bought it to prevent the creditors of the building company from collecting large damages, and with the idea of discharging it, and that its foreclosure was an afterthought.

Appellees cite portions of the opinion in *Sisk vs. Rapuano*, 11 A L R, 1291, as authority. If the words of the opinion which are cited were used with respect to facts in anywise analogous to the facts of this case, they might be considered some authority, but they were not. In that case the trustee did not use money in his hands to buy the mortgage, but attempted to change an agreement made between the bankrupt and the mortgagee before the adjudication, wherein certain insurance money *was applied by the bankrupt and the mortgagee to the satisfaction of the mortgage*, and to keep the mortgage alive notwithstanding this agreement, application and payment. Quite rightly the court held that he could not do this. The court

says, referring to the contentions that the intention of the parties must prevail, that the intention was to keep the note and mortgage alive, and that the parties, not the court, had the right to apply the insurance money and had done so, (*italics ours*):

“These propositions *assume that the trustee and the mortgage were free to deal with the insurance money as they saw fit, and might make such application of it as they chose; whereas, the defendants claimed and the court so rules that, by the terms of the policy, the insurance money, or so much of it as was necessary for that purpose, had already been applied, or agreed to be applied in case of loss, to the payment of the mortgage * * **. In this case, however, the mortgage debt was due when the insurance was paid * * * it will, therefore be apparent that if Miss Bowler (the mortgagee) had received her agreed share of the insurance money directly from the insurance company after the debt was due, she would be bound to apply it to the extinguishment of the mortgage * * *. In this case the contract of the insurance company to pay the mortgage was for the benefit of Grillo (the bankrupt mortgagor) and for the purpose of entingushing his liability on the note and of releasing his land from the encumbrance of the mortgage. After the loss, and before it had been adjusted, Grillo conveyed the land to Ruby by warranty deed free from all encumbrances, and undertook to apply the insur-

“ance money in payment of the mortgage debt. “He thus remained liable on the note and on the “warranty, and had the same interest as before “in requiring the insurance company to carry out “its agreement so as to extinguish the debt and “release the land.”

(The court had previously pointed out that the insurance company by its contract had agreed to pay the loss, if any, to the mortgagee as her interest might appear, and that the insurance company could not change this contract without the consent of Grillo.) The court then goes on to say:

“The appointment of the trustee in bankruptcy “did not release the insurance company from its “agreement with Grillo and if the transaction “recited in the findings amounted in substance and “effect to a performance of the open mortgage “clause by the company, and the acceptance of the “fund by the mortgagee, the mortgage debt was “extinguished in the manner contracted for by the “policy.”

The court held this to be true, that the transaction amounted to a payment by the insurance company of the mortgage debt pursuant to its contract agreement with the insured and an acceptance thereof as payment by the mortgage. Naturally the attempt of the trustee to change this agreement and alter these facts could not be sanctioned.

The facts in this case are entirely dissimilar.

There was no agreement of a third party with the bank to pay this mortgage; there was no application of any money by the bank to the payment of the mortgage, and no agreement on the part of the Penn Mutual to accept any particular fund and apply it to the payment of the mortgage; there was no attempt on the part of the Supervisor to change any agreement made between the bank and the Penn Mutual and any other party. With respect to the money that the Supervisor paid for this assignment, the Supervisor was absolutely free to deal with it as he chose, at least in so far as the payment of the Penn Mutual mortgage is concerned, and the Penn Mutual was under no obligation to apply the Supervisor's money to the payment and extinguishment of the debt, but was free to deal with the money and the mortgage as it saw fit.

Appellees then advance what seems to us to be a wierd proposition, to the effect that even though the building company could not have defended against the mortgage in the hands of the bank, that nevertheless the creditors of the building company could, because they could rely on that part of the record which showed the warranty deed and ignore that that part of the record which showed the mortgage. This is at variance with the holding of the Court, particularly the Washington court, which has held time and time again that the record is notice to all the world. In the case of

University State Bank vs. Steeves, 85 Wn, 55, it is said:

“The mortgage was of record in the auditor’s “office and unsatisfied of record. This of itself is, “in any event, sufficient to bind those who became “interested in the property subsequent to the execution and recording of the mortgage.”

Appellees also assert that “*the bank*” made false representations which induced them to make these contracts. These representations were to the effect that the \$600,000.00 mortgage had been arranged for with the Metropolitan, and that the right to lien had to be waived so as not to interfere with the mortgage, and that there would be \$400,000.00 available to begin the work. Even if these representations were made “*by the bank*” the bank made them good and to spare, having advanced a total of \$443,000.00 in cash to the building company. (Ex. 348, Tr. 1235.) So that these representations could have no effect on the rights of the Supervisor with respect to the \$70,000.00 mortgage. But these representations were not made by the bank. The evidence showed that they were made by Drury, Larson Webber and Simpson, in Webber’s office in the Tacoma Hotel, which was then the headquarters of the building company, when the contractors were entering into written contracts with the building company. (Tr. 1115-16.) Neither Simpson or Webber had any connection whatever with the bank. Drury and Larson, although officers of the

bank, were the president and principal stockholder respectively of the building company.

In this connection the court will notice that the lien claimants in their briefs herein attribute to the bank as a corporate entity the intentions, motives and acts of Larson and Drury, even though the evidence shows that at the very time they were engaged in the conduct of the business of the building company, or even engaged in the business of the looting of the bank for their own private profit, or for the profit of the building company. So that it will not just for the court to accept their statements as to what the bank did or intended without investigation. Usually the court will find that it was something that Larson did or intended, and Larson was then engaged in the perpetration of a fraud on the bank.

We do not question the rule to the effect that one who is under a legal obligation to pay a mortgage cannot pay it, take an assignment of it, and then enforce it to the disadvantage of anyone to whom his obligation to pay extended, but this rule is subject to the exception that he can enforce it against anyone to whom his obligation to pay does not run. For instance, if A buys property encumbered by a mortgage which he assumes and agrees to pay and is thereafter ousted by B by virtue of some superior title, A would have the right to fulfill his contract by buying the mortgage, could take an assignment of it and foreclose it as against B, or

anyone claiming under B, because he was under no obligation as for as B was concerned to pay the mortgage. So in this case, at least, while the building company was in default in its agreement to pay the bank for the land, the bank was under no obligation to pay the mortgage, and if it was obliged to pay it, it could take an assignment of it and foreclose against the building company, and any one claiming under the building company.

But the appellees would have the court go even further than this, because even if we assume that in this case the bank was legally obligated to pay the mortgage, the Supervisor was not only under no obligation to pay it, *but was under a legal obligation not to pay it*, if thereby he preferred one class of general creditors to the rest of the general creditors of the bank.

Nor do we dispute the general principle of law that one who has been paid the full purchase price for his land and conveys it by warranty deed cannot thereafter purchase and outstanding title or mortgage and assert it as against his grantee or anyone claiming under his grantee. But if the grantor as trustee bought the outstanding title or mortgage with trust funds for the use and benefit of the *cestui*, as such trustee he could enforce it even against his grantee. In such capacity he would be a stranger to his grantee. So that in this case even though the bank could not have bought up and enforced this mortgage, the Super-

visor as a trustee for the creditors of the bank having purchased the mortgage with trust funds could enforce it.

Besides this, we submit that no court has ever held or ever will hold that a grantor who has been induced to convey away his land by warranty deed and who has expressly assumed to pay an outstanding encumbrance, in consideration of the agreement of the vendee to pay him at some future time, may not take an assignment thereof and enforce it even against his grantee after the default of his grantee.

Notwithstanding the refusal of the appellees to recognize the distinction between the title acquired by the Supervisor from the bank by operation of law, which we admit to be nothing more or less than the bank's title subject to all outstanding rights, and the title acquired by the Supervisor as a trustee when he uses the trust funds to purchase property for the benefit of the *cestui*, we believe that the court will recognize that there is very great difference. We also believe that the court will have no difficulty in distinguishing the difference between a receiver of an insolvent corporation who represents not only its creditors, but the corporation and its stockholders as well, and the Supervisor who represents only the creditors and who does not represent the bank or its stockholders.

We believe that we have already answered the somewhat lengthy argument of appellees to the

effect that we are attempting to enforce the contract whereby the building company agreed to give the bank \$350,000.00 of second mortgage bonds, and to repudiate that contract at the same time. We recognize the rule which prohibits this, as the law. This contract, however, contains no provision whereby the bank agreed to pay this \$70,000.00. As a matter of fact we believe that this court will agree with us that as between the bank and the building company this \$70,000.00 mortgage was to be paid by the building company and that the failure to incorporate an exception of this \$70,000.00 mortgage in the warranty deed was a mere oversight; but be that as it may, if the bank did agree to pay this mortgage in consideration of the building company's engagement to pay the bank \$350,000.00, it was by virtue of the warranty implied by the use of the warranty deed or some oral agreement. We are, therefore, not attempting to enforce and repudiate the same agreement. And, as we see it, even if appellee's contentions be true, the only effect of such an agreement would be to reduce the amount of our recovery from \$350,000.00 to \$280,000.00. As illustrative of the legal proposition to which we have called attention, we cite the Court to the following cases in addition to those cited in our opening brief:

Greenwell, Admr. vs. Heritage, 70 Mo., 459
Begein vs. Brehm, 23 N. E., 496
Arnold vs. Green, 23 N. E., 1

Howard vs. Robbins, 63 N. E., 350

University State Bank vs. Ellison, 85 Wn.,
55; 147 Pac. 645; and 2 A. L. R., 237

where the same is extensively annotated.

Wood vs. Smith, 51 Iowa, 156; 50 N. W.,
581

The \$600,000.00 Mortgage

In considering this case, the Court will bear in mind that it is really a contest between creditors for priority. One class of creditors, the lien claimants, asserting that they are entitled to priority in the insolvent estate, as against another creditor, the Supervisor, who in turn represents the creditors of the bank, which was a creditor of the building company. If they were all simple creditors, the maxim "equality of equity" would apply. By virtue of the fact that they are creditors, therefore, they stand on an equal footing, and neither has any equity superior to the other. They all gave credit to the building company. If there is any priority between the lien claimants it is by virtue of the Statute and not by virtue of any inherent equity in their position. On the other hand if the Supervisor is prior to them it is because of the Statute and the rules of law surrounding the mortgage.

Prima facie the lien claimants are inferior to the mortgage because it was of record, apparently valid, at the time they lent their credit; and they

had actual knowledge of the fact that it was to be placed of record and would be superior to their claims of lien at the time they made their contracts; and they furnished their material on the assumption that the mortgage was superior to any right they could acquire.

To overcome this *prima facie* inferiority they assert that the mortgage was invalid.

It is said that there was no consideration for its execution, but, we submit, this is obviously not a tenable position. It covers three lots which were deeded to the mortgagor *in consideration of the agreement of the mortgagor to issue this mortgage*; the consideration for the deed was (among others) the mortgagor's agreement to erect a building on the lots and rent a portion of the building to the bank, the grantor, and "for the purpose of financing the erection and construction of said building" the grantee agreed to execute and deliver this mortgage before any actual construction should begin. (Ex 184.) If there was a valid consideration for the mortgage, then another objection, namely, that it contravened the Constitution of Washington is untenable. And one of the principal reasons why the Metropolitan was willing to loan on the mortgage was the agreement of the bank to rent the banking room from the building company. That there was a consideration for it is too plain for argument.

It is said it was not used for the purpose for which it was executed. What was its purpose? Obviously to borrow money. Can the mortgagor, or anyone claiming under the mortgagor, claim that it was invalid because the money was paid to the mortgagor before the time it was intended to be paid when the mortgage was executed? At the time the mortgage was executed and placed of record, it was made to run to Simpson rather than to the Metropolitan for the very purpose of using it "as collateral for money borrowed during the construction." (Ex. 222, Tr. 1093-0.)

It is said it was paid by the bank which did not intend to lend at the time it was executed. What of that, if it was actually paid to and received by the mortgagor.

It is said that the mortgagor did not know that the bank had taken an assignment of it and was advancing the money on the strength of it. This is a question of fact. Drury, the president of the mortgagor, knew it, and suggested that it be assigned to the bank to protect its interest to Sheldon, the secretary of the mortgagor, (tr 1154,) who thereafter delivered it to Larson, the man who owned all of the stock, who said he was taking it to "have a proper assignment drawn up in favor of the bank, for the reason that the bank had advanced certain moneys and would have to advance some more, and this assignment was taken for the protection of the bank." (Tr 1161-62.)

It is also contended that it was not "delivered" or did not "attach" prior to the time the materialmen began to "furnish" their material. It is delivered and "attaches" when it is placed of record, pursuant to a valid agreement and passes beyond the control of the mortgagor.

It was placed of record, there is no controversy over that.

This was done pursuant to a written contract supported by a valid consideration. Although this is controverted, it is because appellees have overlooked the terms of the written contract whereby the building company agreed to erect the building, and for that purpose to execute and record this particular mortgage "before actual construction shall begin, and before any contract for such construction shall have been let." The word "execute" purports a valid delivery, an instrument is not executed which is not delivered. In view of this contract, it can scarcely be argued that both the bank and the building company did not intend that upon the delivery to Simpson and its record with the Auditor, it should become a valid lien against the title of the building company to the lots in question. The contractors had both actual and constructive notice of it and deliberately waived their liens in order that no question as to its priority could be raised. Had the building company refused to execute it, the bank would have had a cause of action for damages for breach of this contract. Under the

circumstances of this case we feel sure that no court would hold the building company in this respect had not fulfilled this covenant and that the bank could have maintained an action thereon for its breach. If this be true it was delivered and attached at the time of its record. The question as to when it attached is really settled by the Lien Statute itself. The question of law as to whether once attached it is security for future advances made on the strenght thereof, is settled by the cases cited in our opening brief.

As to whether these advances were made on the credit of the mortgage: we assert that they were; appellees assert that they were not. It is true that Larson said that they were not, but in the very sentence in which he says that they were not, he shows that that was the intention. He says (Tr 1085) after refusing to answer various questions because he had been arrested 36 times and was not going to be arrested the thirty-seventh:

"I expected simply to use the \$600,000.00 second mortgage for the purpose of making this temporary loan of \$300,000.00 or "\$400,000.00, it was "to be used as collateral, there is no question about "that at all. The \$600,000.00 mortgage assignment was not taken with any idea of security or "preference whatever and when I got back on "October 17th, I told the Bank Commissioner *we* "would have to carry this building to completion "before *we* could get the money from the Metro-

"politan."

Again he says (Tr 1049) :

"When we ran into this delay and all that trouble came, the mortgage was sent to Philadelphia and Mr. Simpson put it in the Prudential Insurance Company to get a temporary loan of \$400,000.00 on it to go to pay the bills that we had never expected to pay until the building was finished. *That was the reason we bought the mortgage* in, and that was the reason the mortgage was in Philadelphia * * * ."

The evidence shows that after it was assigned to the bank, the bank loaned the building company \$200,000.00 upon notes which were carried as loans secured by real estate and referred to a docket case which contained the note, mortgage and assignment. (Ex 185 Tr 1026; Ex 188 Tr 1030; Ex 336, Tr 1218.) Besides this there were various interest charges represented by a check of the building company which Larson ordered held as a real estate loan until an advance was secured upon the mortgage (Ex 188, Tr. 1030), and an overdraft of \$32,746.42 when the bank failed.

There remains only \$200,000.00 stock transaction to be considered. Larson subscribed for the stock of the building company, representing to the other officers of the bank that he had it placed or a place for it. On June 5, 1920, the Simpson note

and mortgage were in the bank and Larson wrote to the Metropolitan trying to get them to make an advance on it. On June 11, 1920, they replied, refusing to make the advance, but suggesting that the bank might do so *on the strength of their mortgage*. On June 25, 1920, Larson wrote out a deposit slip indicating that the building company had deposited \$200,000.00 in the bank, to which he attached a note directing the clerks to credit the building company with that amount, and to charge account No. 13, stocks and securities, with the notation, subscription to the capital stock Scandinavian American Building Company. On June 28th he left a note with Sheldon requesting him to hold the note and mortgage until an advance could be obtained on it. In September he took the note and mortgage from Sheldon, giving him a receipt therefor, for the purpose of getting an assignment from Simpson to the bank as security. On October 7th he got the assignment. Thereafter the advances were made and in December he directed the clerks to charge the building company interest on the \$200,000.00 stock transaction. While it is true that the evidence of an intention to lend this money on the strength of this mortgage is much weaker than the other loans, nevertheless we submit that this does show an intention so to do. The intention of the bank in that respect must have been the intention of Larson at the time he made these entries, since none of the other officers of the bank knew anything whatever about it, with the excep-

tion of Sheldon, who looked it up a few days thereafter to find out how it was that the building company had gotten this credit.

Some of the materialmen claim that this was a sale and that thereby the bank became the owner of the stock. It was obviously no sale, the bank could not be made to purchase this stock without its knowledge or consent. Besides this the books of the building company show that this deposit was made by O. S. Larson.

If it was not a loan on the strength of this mortgage it at least constitutes a simple claim against the building company for the money had and received.

Respectfully submitted,

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Attorneys for Appellant.

No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, as Receiver of
Scandinavian-American Building Com-
pany, a corporation, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY,
a Corporation, et al, *Appellees,*

BEN OLSON COMPANY, a Corpora-
tion, *Appellant,*

vs.

McCLINTIC-MARSHALL COMPANY,
a corporation, et al, *Appellees,*

RECEIVER'S ANSWERING BRIEF TO BRIEF OF BEN OLSON COMPANY, APPELLANT

KELLY & MACMAHON,
Attorneys for Receiver.

1005 Rust Bldg., Tacoma, Wash.

Filed this.....day of March, 1923

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

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a Corporation, et al, *Appellees*,

BEN OLSON COMPANY, a Corpora-
tion, *Appellant*,
VS.

McCLINTIC-MARSHALL COMPANY,
a corporation, et al, *Appellees*,

RECEIVER'S ANSWERING BRIEF TO BRIEF OF BEN OLSON COMPANY, APPELLANT

This appellant, the Ben Olson Company, filed a lien against the property of the Scandinavian American Building Company for \$41,666.32, and in this action seeks a foreclosure thereof.

In order to make this action more interesting the appellant also desires to sue in this action, its co-defendant, the Supervisor of Banking, to establish its claim for damages as against the assets of the defunct Scandinavian American Bank of Tacoma, in

his hands for liquidation and distribution in the sum of \$8,029.77.

The contract which the appellant signed was in writing and was made with the building company, it recited therein that the building company owned the property in question, and was engaged in the erection of a building thereon, the appellant filed its lien against the Building Company and sued the Building Company in this action, but the appellant now takes the position that there was no such corporation as the building company and that the bank in fact owned the real property and was erecting the building and that no estoppel arises out of the written terms of the contract. If this be true in fact and in law, this whole action must fail except as to this appellant, as the Supervisor may not be sued unless a claim be first presented to him and rejected by him; and under the Washington Lien Statutes the other lien claimants would have no lien because they failed to file same as against the Bank. If that be true also, the action of the Court in appointing this respondent as receiver is illegal, in that, under the terms of the Washington Statute no receiver may be appointed to take charge of the assets of an insolvent Bank. The contract which the appellant signed contained a clause expressly waiving appellants right to a lien, and the appellant's lien and proof all go to the contract price and not to the reasonable value of the material furnished; appellant claims the

right to repudiate that one clause of the contract without rescinding the contract, notwithstanding that clause which absolutely bars this action under the contract.

We submit that the learned counsel for appellant has not violated the elementary principles of law suggested by the statements which we have made, through any misconception as to the law, but in an endeavor to distract attention from the unjust and inequitable claims of his client. Many of the statements of fact made in the brief find absolutely no support in the evidence.

Merely to illustrate what we have said, we call the Court's attention to the following misstatements contained in the Brief:

On page 19 the statement is made that Olson's estimate No. 4 "was presented but there was no approval, because the entire project was abandoned." The evidence (Tr. p. 883) "This estimate was never presented."

On page 23, the statement is made "These items are itemized in Estimate 6; they were brought to Tacoma ready for use, were billed to appellant by Crane Company, and because of their fragile character were stored by Crane Company, neither the building nor appellant having proper storage space."

The Crane Company sent the Building Company

an invoice of each shipment delivered to Olson. Under our law this is a prerequisite to the enforcement of a lien; the Crane Company did not even claim a delivery of these items to Olson, and did not even include them in their lien. The testimony (Tr. p. 897). "They were not taken to the building * * * I do not recall that we notified the building company or its representatives of the fact that these materials were here."

On the same page it is said, "The lien prayed for was \$41,656.33, less whatever sum should be awarded Crane Company as a sub-contracting materialman, which turned out to be \$16,047.03," failing to call attention to the fact that the Crane Company lien was reduced from \$20,416.80, because of the fact that the 86 closets were not delivered. So that if appellant were entitled to a lien for these closets, Crane Company is also entitled to a lien therefor.

Upon the merits of this case, these various "estimates" put into evidence by Olson, in so far as they can be checked at all, show the inequity of Olson's claim. The Court will bear in mind that practically all of the material for which Olson claims a lien was bought from Crane Company; and although Olson Company had been paid \$13,425.56 for this material, it had not paid Crane Company anything at all.

The lien claim of this appellant may be divided into materials of six classes.

The first class: the labor and material actually furnished to the building by the appellant, for which no one else was claiming a lien; this amounted to material of the value of \$1,173.99 and labor of the value of \$2,279.80 (Ex. 357, Tr. pp. 965-6). If the appellant was entitled only to a lien for this amount the evidence showed that it had been overpaid to the extent of \$10,000.00.

The second class: the material furnished by Olson which he had gotten from Crane Company but for which he had not paid Crane Company and for which Crane Company had filed a lien which was adjudged valid and foreclosed in this action, and upon which the Court allowed Crane Company costs to the extent of \$2,000.00. If the appellant was entitled to a lien for these materials at the price at which he "estimated" them, (which includes 50% profit for merely ordering them from Crane Company) and also to the labor and material mentioned in the first class, he would still be overpaid to the extent of nearly \$5,000.00.

The third class: The 86 closets in Crane Company's warehouse (Estimate No. 5) for which both Crane Company and Olson filed and claimed liens but for which the Court disallowed Crane's lien except as to \$1,720.00 for portions actually delivered to the building, Crane Company's balance being \$4,398.90, Olson's balance being \$6,132.66. On this item Olson only claimed to be entitled to a profit of 36%, and if this profit were allowed him, but

his profit on the materials mentioned on the class number two were reduced to 36%, Olson would still be overpaid, and the receiver, of course, would be entitled to the closets,—if he could get them.

The fourth class: the pumps, hose racks, valves and steam trap not itemized in the evidence, (but itemized by the appellant on page 22 of its brief,) all of which was gotten by Olson for use in the building, but which was never delivered to the building, and which Olson values under his “estimated” prices at \$5,875.60. The evidence does not show how much of a profit is included in this estimated price, but assuming that to be 50%, and reducing Olson’s profit on this material and all of the material above mentioned, in classes, 1, 2 and 3 to 15%, would still leave Olson indebted to the building, and the receiver, of course would also be entitled to the materials.

The fifth class: the radiator valves ordered by Olson through Godfrey Jones Company, the agents for C. A. Dunham & Company, for with Olson had agreed to pay \$1593.75, but for which he was filing his lien for \$2250.00, the Court found that 15% profit was a reasonable profit to be charged by Olson for ordering these goods from other parties. If Olson’s profit on all of the materials be reduced to 15% in conformity to the Court’s decision, this item and all of the other items above mentioned might be allowed to Olson, and he would have a lien of less than \$2,000.00—and the receiver

would, of course, be entitled to the material.

The sixth class: certain lavatories, slop sinks and urinals ordered by Olson from Crane Company which were in Crane Company's warehouse, but not delivered to Olson, and not paid for by Olson, and for which the Crane Company claimed no lien.

The inequity of the Olson "lien claim" may be gained from the following comparison of values as shown by the Crane lien claim and the Olson "estimated values."

Olson Estimate	Price	Crane Lien	
		Price (Tr. p. 937)	Profit
Estimate No. 1 (Tr. p. 875)			
Carload of pipe..	\$ 8,233.03	\$ 5,498.01 (A 2)	\$ 2,735.02
Estimate No. 2 (Tr. p. 879)			
Pipe	7,043.51	4,730.58 (A 4)	2,312.93
Estimate No. 3 (Tr. p. 881)			
Galvanized pipe ..	3,648.95	2,445.45 (A17)	1,203.50
Galvanized drain- age fittings	2,445.45	1,433.83 (A 6)	1,011.62
	<hr/>	<hr/>	<hr/>
	\$21,350.94	\$14,107.87	\$ 7,263.07

So that for goods which Olson procured on the open market for \$21,000.00, and which he did not pay for and for which the materialman established his lien with \$2,000.00 costs added, Olson wants a lien for more than \$7,000.00 profit.

The Trial Court in his decision states that he was unable to ascertain just what, in figures, this claimant was claiming, and with the help of the record and the assistance of counsel's brief we are in a like situation. Every person who tries to figure this claim arrives at a different conclusion. As illustrative of this we call attention to the summary prepared by Mr. Herber as shown in Exhibit 269 at pp. 919-20 of the record which arrives at \$54,081.89, while counsel in his brief, p. 46, arrives at \$55,285.85, a difference of \$1200.00 in favor, of course, of the Olson Company.

Eliminating from Olson's Claim the items which were never delivered and the items retaken by Olson under the Court's order, will show that even allowing Olson the 50% profit which he contends he is entitled to make for merely buying material from a wholesale house, Olson has been overpaid to the extent of nearly \$5000.00. The following are the figures (Ex. 269, Tr. p. 919).

Estimates:

No. 1	Material	\$ 8,387.03	
	Labor		\$ 163.00
No. 2	Material	7,764.83	
	Labor		208.00
No. 3	Material	7,814.40	
	Labor		779.00
No. 4	Material	665.81	
	Labor		1,129.80
		<hr/>	<hr/>
		\$24,632.07	\$2,279.80
	Total		\$26,911.87
	Less Crane Lien allowed	\$16,047.08	
	Less Crane costs allowed	2,000.00	
	Less cash paid Olson	12,425.56	
	Less credit for old fixtures	1,000.00	
		<hr/>	
	Total		\$31,472.64

As we have shown, at least \$7200 of this \$26,900 claim is mere profit—what the profit on the whole \$26,900 claim is, is not shown by the evidence, but if the same ratio was maintained it was about \$8,500.00.

The Court will notice that this computation pays Olson for all the labor actually performed by him, at his own “estimate” price.

The Court will bear in mind that the contract which Olson signed required him to furnish and install all the plumbing for the lump sum of \$91,000 and that Olson’s “estimate” prices are not the

contract prices in the sense that the building company agreed to pay the sums set forth in these estimates for the materials therein specified, but the "estimate" price is the price at which Olson says he figured this material in arriving at his bid of \$91,000 for the whole job (Tr. p. 888). It is elementary, therefore, that Olson can recover, if at all, not on these "estimate" prices but on the quantum meruit. What the reasonable value of this material and labor is, is a matter of pure conjecture under the evidence. It is true the cost price of a portion of it is shown by the Crane Company evidence and that would indicate that it cost Olson approximately \$18,000.00, but that is as far as the evidence goes. The appellant therefore entirely failed to prove facts upon which a lien could have been established, even had he not been fully paid.

Olson claims, however, that he is entitled to a lien for 86 closets as set forth in his estimate No. 5. (Tr. p. 898.) His estimate price is \$7,852.66 for the closets complete. These closets consist of four major parts, the wall closet, the flush valve, the seat and the Hurlbut Fitting. (Tr. p. 939). The Hurlbut Fitting is a piece of pipe which is set into the wall of the building as a sewer connection or drain. (Tr. p. 942.) Olson took from Crane Company one of these closets complete and the Hurlbut fittings for all of them and these were delivered to the building.

Olson put these Hurlbut Fittings in his estimate No. 3 (4th item, Tr. p. 881) at \$20.00 each or for a total of \$1720.00, and the Court allowed Crane Company a lien therefor at that price.

Both Crane Company and Olson filed liens for this item. (Crane Co. Exhibit "7", Tr. p. 939). The Crane Company price for the closets complete, was \$6118.90. The evidence does not show why Olson dropped his profit from 50% to 36% on this item. The reasonable value of these articles is not shown except as these figures may tend to show it. But even if Olson were allowed this item together with his profit of 36% for merely ordering them from Crane Company he would be entitled only to a lien for \$1,571.89, and the Receiver would be entitled to receive these closets,—if he could get them—from Crane Company. In that event Olson's claim of \$26,911.87 would be increased by \$6,132.66 making it total \$33,044.53 against which there would be the off-set of \$31,472.64. But if the Court were disposed to hold that 36% was a sufficient profit to be allowed Olson for the items bought from Crane which went into the total of \$26,911.87 (this Brief p. 9..) and to reduce that accordingly Olson would still be indebted to the Building Company in approximately the sum of \$1500.00, and the Receiver would be entitled to these closets— if he could get them.

The Court disallowed this item except as to the one closet delivered and the Hurlbut Fittings

upon the ground that there was no delivery thereof.

Olson also claimed a lien for certain pumps, hose racks and radiator valves of the "estimated" value of \$5,875.60, which are not itemized in the evidence but which counsel has itemized on page 22 of appellant's brief, and for certain urinals, lavatories and slop sinks of the "estimated" value of \$12,910.76 being a part of Estimate No. 6 (Tr. p. 900) and itemized by appellant on page 23 of its brief.

Olson also claimed a lien for \$2,250.00 for radiator valves order (Tr. p. 906) from C. A. Dunham & Co., through their agents Godfrey Jones Co. at a price of \$1,593.75 (Tr. p. 967) and undelivered by them to Olson but still in their possession, and unpaid for by Olson. (Tr. p. 900.)

The Court will notice that in making up his "Estimate No. 6" (Tr. p. 900) Olson made a further drop in his profit percentage (the prices at which he had ordered the material from Crane are shown by his order.) (Ex. 273, Tr. p. 944.)

This comparison shows this:

	Olson Price	Crane Price
Urinals	\$81.10	\$63.19
Lavatories for Toilet Rooms	48.70	37.95
Lavatories for Offices	34.77	27.10
Slop Sinks	49.70	38.50

An average profit of only about 25%. So that had the Court Court decided that the closets and

the material in Olson's shop and Godfrey's shop had been "furnished" within the meaning of the lien statutes, but that Olson was entitled to only a 25% profit, Olson would have been entitled to a lien of less than \$1,000.00, and all of that material would have belonged to the receiver. And this gives Olson all the profit he is claiming on the material in his own shop and on the material and labor which he furnished, the cost price of which does not appear in the evidence. The following are the figures:

Crane lien (inclusive of the closets)	\$20,416.80
25% profit	5,104.20
Godfrey valves	1,595.75
25% profit	398.44
In Olson's shop	5,875.60
Material furnished by Olson (Ex. 357)	1,173.99
Labor furnished by Olson (Ex. 357)	2,279.80
	<hr/>
	\$36,844.58
Credits	\$31,472.64
	<hr/>
	\$ 5,371.94
Balance of Crane's claim for closets	\$ 4,398.90
	<hr/>
Claim	\$ 973.04

In estimating Olson's damages by virtue of the breach of the contract the Court arrived at 15% profit as fair. Therefore, if the trial court had found that these materials had been "furnished" by Olson, and allowed a recovery on the cost price

plus 15%, Olson's lien would be for less than \$2,000, and the rest of the creditors would have benefitted by this undelivered material which is probably worth \$10,000.00

The following computation shows this:

Materials from Crane, inclusive of the closets as	
shown by Crane's lien	\$20,416.80
Godfrey valves	1,595.75
<hr/>	
\$22,012.55	

Olson's "estimated" value of the material actually furnished by him was \$1,173.99, and the value of the material at his shop, i. e., the pumps, racks, etc., as "estimated" by him was \$5,875.60. These two items total \$7,049.59. The evidence does not show what they actually cost, but assuming that these "estimated" values includes a 50% profit as he was charging on the other items, this profit would amount to \$2,339.00, and the cost price would be less than \$5,000.00. Adding \$5,000.00 to the above total would make it \$27,012.55. Adding 15% to this as profit, or \$4,051.88, and also Olson's full "estimated" value of the labor actually furnished by him, (since we think he should be entitled to more than a 15% profit on the wages of the men employed by him) the following results:

Known cost prices of materials	\$22,012.55
Estimated cost prices of materials furnished and on hand in his shop	5,000.00
15% profit on above items	4,051.88
Labor furnished	2,297.80

Total \$33,344.23

From which deduct:

Cash paid Olson	\$12,425.56
Credit for old fixtures	1,000.00
Crane lien as allowed (which ex- cluded the closets)	16,047.08
Costs allowed Crane Company....	2,000.00

Total \$31,472.64

Olson's claim \$ 1,871.59

Had the court determined on the trial that all of this material had been "furnished" within the meaning of the lien law, without any doubt the receiver could have gotten the closets from Crane Company because the court would have had to allow Crane's lien therefor, but what about the Godfrey valves? They did not belong to Olson, they were never in Olson's possession, they had never been paid for by Olson, and Godfrey was claiming no lien therefor. The Court had no power to force Godfrey to deliver them and the receiver could not have recovered them by suit, Olson's lien in this respect is manifestly for something that was not furnished.

Appellant, however, claims that he is entitled

to a lien for these undelivered materials even though they were never delivered anywhere to anyone because they were "specially constructed" for this building. This claim, even if that be the law, is not supported by the evidence.

There is not even any claim made *in the evidence* that the pumps, hose racks and radiator valves which are enumerated in appellant's brief at page 22 are special. In fact Olson says with reference to the valves (Tr. p. 906): "They could be used on any type of radiator but only where that particular system of heating is in use;—I mean the vacuum system of heating" and further on the same page, "The pumps were from Fairbanks Morse Company, the hose racks from the United States Rubber Company on A Street."

Of the urinals, lavatories and slop sinks contained in Estimate No. 6 for which he claims a lien of \$12,000, although they have never even been delivered to him by Crane & Company, and are in the Crane Company warehouse—or were there—Olson says: "The toilet sets could be used any place where an architect would specify," (Tr. p. 902), also: "They are not of Crane Company make. They were made by the Pacific people in this case. We bought them from Crane Company but they were products of the Pacific Company, which manufactured all those goods." (Tr. p. 904.)

With reference to the closets mentioned in Esti-

mate No. 5, for which he claims a lien of \$6,000.00, Olson says (Tr. p. 905), "with these fittings (the Hurlbut Fittings) and the other material which is in Crane Company's warehouse, we would have complete closets suitable for installation in any public building where they are specified."

All of this plumbing was shown and offered for sale in the Crane Company catalogue. There was evidence, however, that it was special because it is ordinarily made up upon order and is not ordinarily carried in stock, also because of the large quantities of the articles specified in this building; but this does not bring the material within the rule of a specially manufactured article, which requires that the article be such that it is unsuitable for other buildings of a similar character.

Appellant's "First Error"

In answer to the argument made under this head with reference to delivery, we refer the Court to our brief in the Washington Brick Lime & Sewer Pipe Company case for our views upon the law.

Upon the facts, Olson has never parted with title to these undelivered materials. This is shown most emphatically by the fact that after the appointment of the Receiver herein, he applied to the Court as the owner of the materials *upon the building site* and persuaded the Court to permit him to take from the receiver materials of the value of nearly five thousand dollars upon the theory that

he owned them. If he owned the materials delivered to the building, how can he claim that he does not own the material at his shop.

With reference to the closets, urinals, lavatories, etc., which were in Crane's warehouse—what assurance is there that they will ever be delivered to the receiver, if Olson is allowed a lien therefor? They did not belong to Olson, they belonged to Crane Company. Olson has never paid for them and Crane has never delivered them to Olson. Crane Company is apparently satisfied with the decree as rendered. Since the rendition of the decree, Crane Company have had the legal right to sell these articles and have had it in their power to do so, since they have been in their possession and are their property.

Appellant's "Second Error"

We are not particularly interested in the question raised by this assignment, because we believe we have shown the Court, even allowing Olson his full "estimated profit," instead of the building company being indebted to him, he is indebted to the building company.

At this point, however, it might be well to recall to the court's attention the fact that Olson's contract contained an express waiver of the right to file a lien, and to the elementary law that a contract rescinded must be rescinded in toto. It is

not the business of the court to make contracts for the parties. The Court has no legal right to force one contracting party to perform the covenants of the contract on his part to be performed, but at the same time to relieve the other party thereto from the necessity of performing his part of the contract. That would be for the court to make a contract for the parties, which they, themselves, did not make. We have discussed this question in our appeal brief pages 52 to 55 inclusive, to which we refer the Court.

Appellant's "Third Error"

We disagree with the statement that the trial Court assumed anything other than the true facts or omitted to consider the items of labor amounting to \$2,200.00, or material amounting to \$1,100.00 mentioned by appellant under this assignment.

It would certainly be inequitable for the Court to have allowed the appellant a lien for \$3,000.00 for materials and labor furnished for which he had been more than paid; or to allow a lien for \$3,000.00 when he had filed a lien for \$41,000.00 and attempted to foreclose the same for material which he had not paid for, did not have and did not own; nor to allow this lien for \$3,000.00 when his failure to pay Crane had caused the court to assess costs of \$2,000.00 against the Building Company.

This evidence referred to (Mr. Herber, Tr. p. 965 et seq.) but emphasizes the injustice of appellant's claims. It shows that although the appellant had only furnished \$3,400.00 of labor and material, exclusive of that furnished by Crane Company, for which Crane Company was allowed a lien, appellant had been paid \$13,400.00 or— \$10,000.00 too much.

Appellant's "Fifth Error"

We note the statement made on page 75 of Appellant's Brief under this assignment to the effect that "the supervisor and his deputy, and the Building Company's receiver, are one, the receiver fighting all creditors to assist the supervisor in getting from them the last possible scrap of property standing in the name of the sham corporation. The counsel for the supervisor and the building company are the same—paid out of the bank's assets. Therefore, there will be no resistance to the judgment complained of from that quarter."

If this is intended as invective to prejudice the Court it would probably be unworthy of notice except that the circumstances are such, probably as to warrant an explanation. The State Court had appointed Mr. Haskell, receiver of the Building Company before the application was made in this case for the appointment of a receiver, upon his offer to serve without compensation; this was explained to the District Judge and Mr. Haskell objected to the appointment of a receiver in this

suit. The Court knew Mr. Haskell was the Deputy Supervisor and that Mr. Kelly was his attorney as such and that the Supervisor was asserting the mortgages to be superior to all the liens, but appointed Mr. Haskell, receiver in the District Court, upon his agreement to serve without compensation. At that time it was suggested that Mr. Haskell as Receiver could not contest the mortgages asserted by the Supervisor, but the Court stated that the record in the case and his experience in the case convinced him that there were a sufficient number of attorneys contesting the claims of the Supervisor, and that there was no chance that any possible defense to the mortgages would be overlooked. We believe this Court will fully agree with this conclusion.

If the statement quoted above is made as argument, it is on a par with other arguments advanced by this appellant, notably that found on pages 53-54 of the brief wherein it is stated that the bank paid the Building Company \$200,000.00 in cash and took capital stock of the Building Company, (of the par value of \$200,000.00) *and thus fraudulently deprived* the Building Company of all of its assets.

By the same reasoning the bank also took the notes and mortgages of the Building Company, and only gave the Building Company in property and cash about \$650,000.00 more. In all the Building Company got from the Bank nearly a millian dollars and the bank got several pieces

of paper. The Ben Olson Company got over \$13,000 of this money for material and labor of the "estimated" value (with 50% profit added) of \$3400 and yet it complains that it was thereby defrauded.

Again referring to the quotation we have above made from appellant's brief—we do not believe it to be the duty of the receiver to complain of a judgment which is favorable to the creditors. The decision of the trial court with regard to the Supervisors rights was an overwhelming victory for the lien claimants. The Court refused to follow counsel to the extent of holding that the assets of the Building Company were the assets of the Bank or that the creditors of the Building Company were the creditors of the bank. That is the result argued for by appellant upon the "identity of corporations" theory. The Court could not do this under any rule of law or equity. The unfortunate depositors in this defunct bank, deposited their money in the bank and not in the Building Company, granting that these contractors were equally unfortunate, they nevertheless made contracts in writing—not with the bank—but with the "SCANDINAVIAN AMERICAN BUILDING COMPANY"; these contracts by their terms recited that the "SCANDINAVIAN AMERICAN BUILDING COMPANY"—not the bank—owned the real property in question and was engaged in the erection of a building thereon, and these contractors had all accepted large sums of money from the

Building Company, as such. Equity would, therefore, compel the contractors to look to the assets of the corporation to which they extended credit, and would not permit them to take the position that they were entitled to a preference in the assets of the Building Company over the creditors of the bank and also to stand on an equal footing with the creditors of the bank in the assets of the bank. Equity would have required a marshalling of the assets of these two corporations, even had the court determined that they were one in law, and the creditors of the Building Company would not have been entitled to participate in the assets of the bank until the creditors of the bank had been paid in full, which would give the creditors of the Building Company nothing since the creditors of the bank will never be paid in full or anything like it.

Then too, from the standpoint of practice one defendant may not wage a private independent law suit with another defendant in a suit of this character. This appellant and the two or three other lien claimants who followed the lead of this appellant on this question of "identity of corporations" were in effect asking the Federal Court to compel the Supervisor of Banking to allow their claims as against the assets of the defunct bank. Aside from the question of the jurisdiction of the Federal Court to grant this relief, this would not be a joint right, but a separate independent right of

each contractor,—it would not be an equitable right but a legal right upon which the Supervisor would have a right to a trial by jury. So that the Court could not have granted that relief from a standpoint of practice.

Again, the contractors having filed their liens against the Scandinavian American Building Company and having sued the Building Company in this action, and having signed written contracts with the “SCANDINAVIAN AMERICAN BUILDING COMPANY” which recited that the Building Company was the owner of the real property in question and was engaged in the erection of a building thereon,—are thereby estopped from asserting that they dealt with the bank, and that the bank owned the property and was erecting the building.

Nor would the facts in this case have justified this decision. Appellants statements as to the facts is nearly as wild as its arguments. There are whole pages on the brief purporting to state the facts without any reference to the record as substantiating them, in which we have been unable to find our fair statement, supported by the evidence.

The evidence shows, we think, that O. S. Larson, the President and Manager of the Bank succeeded in hookwinking and deceiving the other directors of the bank, and in this that the directors of the bank were extremely negligent, but the bank cannot be held for the debt of the Building Company

merely because its directors carelessly permitted Larson, without their knowledge, to loot the bank in an effort to build this building with a corporation in which Larson personally owned all of the capital stock. The facts as shown by the record are as follows:

The bank owned lots 10 and 11, Block 1003 "Map of New Tacoma" in 1910, when it had a capital of \$200,000.00. Its capital in June, 1919, was increased to \$400,000.00 (Tr. p. 1236) and in July, 1919, (according to Larson) it determined to increase its capital to \$1,000,000.00 (Tr. p. 1048) but its capital was not in fact increased until April, 1920, (Tr. p. 1036). So that the increase of capital stock had nothing whatever to do with the Building Company.

It is true that Larson stated that in July, 1919, and thereafter the bank contemplated the erection of a new building (Tr. p. 1040) but in this the written evidence overwhelmingly disproves Larson's statement for on August 6th, 1919, Larson wrote the President of the bank that he had instructed attorneys to incorporate a corporation to be known as the "Eleventh Street Improvement Company or some other suitable name" which "will purchase the property from the bank and Drury, construct the building and operate it." And by August 24th he had arranged with Simpson, an Eastern Bond Broker, for a building loan of \$900,000 which would net \$810,000 and Simpson's communications with

Larson shows that this loan was to be made—not to the bank—but to “the building corporation” and Larson’s letters to Simpson show that the only terms that the other directors of the bank would make, were that the bank should sell the lots “outright to the building corporation so that finally the only interest the bank would have in the property would be a lease on the banking room.” (Ex. 199, Tr. p. 1052.) These facts do not justify the statement that the bank set up the Building Company as a screen behind which to escape liability or avoid criticism and they absolutely disprove the assertion that the bank intended to build the building; added to this, every director of the bank was told by Larson that he had the building financed in the East and that not one cent of the bank’s money was to be used in the building. (Williamson, Tr. pp. 1116-18-19; Lindberg, 1126, 1128; Thompson, 1148; Sheldon, 1153; Lamborn 1172.) He also made the same statement to the Bank Commissioner of Washington. (Ex. 219, Tr. p. 1086.)

In fact when Larson had the Scandinavian American Building Company organized in November, 1919, it was understood that the building would be erected for \$860,000 (Tr. p. 1040)—he had a “Commitment” from the Metropolitan Life Insurance Company to loan \$600,000 on it and the agreement of the Scandinavian American Bank of Seattle to take \$150,000 of second mortgage

bonds (Ex. 202, Tr. p. 1058) and the assurance of Webber that he could get the contractors to take a portion of their final payments in second mortgage bonds (Tr. p. . . .)

Although the Washington Statute provides that a duplicate copy of Articles of Incorporation shall be filed with the County Auditor, this is not a condition precedent to the de jure organization of a corporation—when the Articles are filed with the Secretary of State and he is paid a \$25.00 fee for filing them and a \$15.00 fee for the first years annual license fee—he issues to the corporation the authorization of the State of Washington to conduct its business, (R. & B. Code, Sec. 3709-3714) these fees were paid by the Building Company in November, 1919, (Ex. 352, Tr. p. 1246). So that when appellant states that the Building Company was not even a de facto corporation, he is attempting to over-rule the written certificate of the Secretary of the State of Washington which was introduced in evidence in this case.

Appellant contends that the minute book of the Building Company was carelessly kept and that there were no meetings of Stockholders or directors. This minute book was carelessly kept—but so are nine tenths of the corporate minute books of private corporations—and as for the stockholders meetings—Larson owned all the stock except four shares. But this not only does not show any fraudulent design on the part of the bank but is well

nigh conclusive of the contrary. If the board of directors of the bank were intending to perpetuate any fraud through the agency of the corporation, they were experienced enough and intelligent enough to have seen to it, that the records of this corporation would make good evidence in their favor. The facts show that this was Larson's corporation and nobody else paid any attention to it.

In order to impressively argue that the Building Company was doing business before it was legally incorporated, under its theory of the law—appellant states that on “December 10, 1919, Drury the Tailor, conveyed lot 10 to the Building Company.” It was intended to State “November” 10th because that is the date of the deed—but this deed shows that the revenue stamp was cancelled thereon on February 9th, and that it was filed on February 9th (Ex. 352, Tr. p. 1251) and the books of the Building Company show that it was paid for on February 9th (Ex. 352, Tr. p. 1246.)

The statement is made that the McClintic-Marshall contract was made Feb. 6, 1919,—that is the date it bears—but the contract also states that it was made in Pittsburg, Pennsylvania on that date, and the evidence shows that both Drury and Sheldon, the officers that signed it for the Building Company, were in Tacoma at that time.

The Court will bear in mind that both Drury and Larson had personal pecuniary interests to

be subverted in this building operation. If Larson was able to borrow sufficient money on the security of the building as he undoubtedly thought he could, and then had the Building Company lease the Banking quarters to the bank at a rental which would insure that the building would pay enough to carry this loan, as he was figuring on doing (Tr. p. . . .); he had \$200,000 personal profit made. And Drury was canny enough to raise the price of his lot from \$60,000, the price he had given Larson in August (Ex. . . . Tr. p. . . .) to \$65,000.00 in the following February. Although Larson and Drury got this \$65,000 out of the bank, they did it in such way that it did not appear anywhere as a loan to the Building Company at that time, and in such way that Williamson, the attorney for the Bank and one of its directors, and the one man who appears to have been suspicious of this deal, did not know of it. This is conclusively shown by the fact that as soon as Williamson found out that Larson had lent the Building Company \$25,000.00 he resigned as a director of the bank (Tr. pp. 1118-1119). It is significant also that instead of fighting Larson—Williamson resigned.

When this corporation was organized, Williamson, a director and the attorney, and Chilberg, the president and a director, of the bank, questioned Larson with reference to the payment for the capital stock of the Building Company, and Larson led them to believe that he had it placed somewhere.

(Tr. pp. 1109 and 1137.)

In February when these contracts were let and the bank conveyed the property to the Building Company, Larson still had—or thought he had—the finances so arranged that he could pay for the property and erect the building and have his \$200,000 of stock as a profit. The building, according to Webber's plans was to cost \$1,100,000,—he had arranged with Webber to reduce this \$60,000 by eliminating marble (Tr. p. ...) and his words "this one item alone" indicate that there were other contemplated reductions and he had the agreement of the Metropolitan, \$600,000, and the assurance of Simpson that he had placed the second mortgage bond issue of \$750,000 of which the bank was to get \$350,000 for its property.

When it developed that Simpson did not have the second mortgage bond issue placed—he as president of the bank, in March and April lent to the Building Company \$25,000, each month, (Tr. p. ...) these loans were thereafter ratified by the directors—and it was then that Williamson resigned.

As early as June 5th Larson wrote the Metropolitan attempting to get that company to advance money on the \$600,000 mortgage, and on June 11th they wrote refusing to make advances but suggesting that upon the strength of their commitment and mortgage Larson should be able to ar-

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range to have the Bank loan the Building Company money for temporary use, (Ex. 214, Tr. p. 1080) and within a week from the time Larson got this letter, without the knowledge of any of the other directors of the Bank, and in the face of a positive, direct prohibition sent him by the bank commissioner on June 21, and on June 25, Larson gave the clerks in the bank a deposit slip which indicated that the Building Company had deposited \$200,000.00 in cash, to which was attached a memo slip upon which Larson wrote "Debit—account No. 13—Stock and Securities. Payment in full stock subscription Scandinavian American Building Co., \$200,000.00 Contra: Credit Scandinavian American Building Company. O. K., O. S. Larson." (Ex. 190, Tr. p. 1034.) The Court will notice this in nowise indicates whose subscription to the capital stock of the Building Company was being paid but Larson had the book-keeper of the Building Company show on the books of the Building Company that this deposit was made "by O. S. Larson" (Tr. p. 1111), and thereafter Larson gave the Clerks in the bank a check of the Scandinavian American Building Company in which this stock transaction is shown as a loan from the bank to the Building Company. (Ex. 235, Tr. p. 1120.)

This was the first dip that Larson made into the Bank's assets for the benefit of the Building Company, he knew that he could not show this on

the bank's books as a loan from the bank to himself, the Bank Commissioner was already objecting to illegal loans and over-drafts showing on his account (Tr. p. . . .), and under our law it is made a criminal act for a director of a bank to borrow from the bank unless the loan is previously authorized by the board of directors in a meeting at which the borrowing director is not present. So that doubtless Larson made the record that he did so that no one could tell just what the transaction was without an explanation from him. There were no certificates of stock delivered to the bank at this time, as the appellant would have the Court believe, but the certificates of stock were not in fact even made out until after the bank was examined in December by the Bank examiners, and it was at their instance that the stock certificates in the Building Company were made out, endorsed and delivered to the bank, when they were dated back to June 25, to correspond with this loan. (Tr. pp. 1168 and 1165.)

The mere fact that Larson was able to hoodwink the other directors in this manner—or to cow them into submission to his will, if they really did know the facts of the transaction (although they all swear they did not know anything about the transaction, in fact) would not warrant the court in holding the bank and Building Company were one—or that the building scheme was a fraudulent transaction on the part of the bank as a corporate entity. Particularly is this true in view

of the insolvency of the bank and the fact that the equities of the creditors of the bank are equal at least to the equities of the creditors of the Building Company. In this connection the Court will remember that the Supervisor does not represent the Bank or the Stockholders of the bank, but only the depositors.

But even aside from this, how can it be said that the looting of the bank by even its board of directors, who owned at all times less than 20% of the stock of the bank, would make the bank as a corporate entity liable for the debts of another corporate entity? These men did not have the power, express or implied, to give the banks assets away. Under the statutes of this state a bank cannot invest more than 20% of its capital and surplus in real estate, when these men were elected directors they did not thereby become invested with the implied power to violate this law and to invest a sum equal to the entire capital stock of the bank, as thereafter increased, in the erection of a building. The directors had no authority to appoint the Building Company as an agent of the bank for the purpose of erecting this building—the Court could not rule that they could indirectly do that which they could not do directly.

Appellant says the bank continued to carry the real estate upon its reports as an asset, True, it did. Perhaps this was wrong, but it could not have the effect of nullifying a deed theretofore made, executed, delivered and recorded. There is, too, we

submit, a reasonable explanation of this. The bank deeded this property to the Building Company upon the agreement of the Building Company to erect the building, reserve space in it for the bank, and to deliver to the bank before June 10, 1920, second mortgage bonds of the par value of \$350,000. The Building Company never delivered these bonds, so that there was nothing among the assets of the bank to off-set the real property which they had been showing on their reports, and the book-keeper not having any directions from anyone with respect to this matter, made no change in his entries (Tr. p. 1122).

Appellant also states that the Supervisor claims this stock as an asset in his hands. The records of the bank show that this stock is property pledged to the bank and that the bank had lent the Building Company nearly a million dollars, it seems to us that it is natural that he would hold the stock under those circumstances. There was no identity in the stockholders of the two corporations. The purposes for which the two corporations were organized are entirely distinct—the Building Company could not do a banking business and the bank could not own and improve real property. The Building Company was not the agent of the bank in any sense of the word, and it would have been an ultra vires and illegal act for the bank to have attempted to make the Building Company its agent. If there was any fraud, it was not the fraud of the bank, which was itself defrauded.

Appellant argues that the bank was the agent of the Building Company, merely, we presume, because the cases cited by him use that term. In those cases, however, there was a real identity—the stockholders in both corporation were the same, and in each case there was either an intention to defraud or the circumstances were such that it would work a fraud for the court not to put the assets of both into one fund for the benefit of the creditors of both. But all of these circumstances are absent in this case. The Building Company, as we see it, was Larson, and to argue, as the appellant does, that the Bank could control the Building Company, or Larson, it seems to us, is entirely disproved by the record. The criminal statutes of this State did not control Larson, nor did the express and positive commands of the Bank Commissioner deter him,—he was beyond control, but neither the Bank nor its directors nor its stockholders could dictate the policy of the Building Company or in any wise legally control its actions. When the Bank passed the title to this real property over to the Building Company, the bank thereby lost all legal control over the real property except as the contract may have given it a right to insist on the fulfillment of the terms thereof, and if, in fact, it lost control over the land it certainly had no control over the Company.

Respectfully submitted,

KELLY & MACMAHON,

Attorneys for Receiver.

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKELL, as Receiver of
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pany, a corporation, *Appellant,*

VS.

McCLINTIC-MARSHALL COMPANY,
a Corporation, et al, *Appellees,*

BEN OLSON COMPANY, a Corpora-
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**Brief of Ben Olson Company, Appellant, Answering
the Briefs of J. P. Duke, Supervisor et al, and
Forbes P. Haskell, Jr., Receiver, on the Sub-
ject of Appellant's Waiver of its Lien**

STILES & LATCHAM,

Attorneys for Ben Olson Company.

Tacoma, Washington.

Filed this.....day of March, 1923

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 3953

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Statement

When successful bidders on this work were pre-
sented formal contracts for execution they found

therein Paragraph XIV (Rec. p. 316), which read as follows:

“Art. XIV. And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic’s claim for lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.”

One and all they objected and refused to execute with that clause in the contract, and with those who could not be persuaded to accept, the clause was entirely omitted.

The McClintic-Marshall steel contract, the largest contract of all, and the first one entered into, did not contain it; and there were several others.

But others, Tacoma Millwork Supply Company; E. E. Davis & Co.; Edward Miller Cornice & Roofing Co.; Ben Olson Company, and perhaps still others, were persuaded to let the clause remain.

This persuasion was accomplished by the making of five false statements by Larson, President of the Bank, and Drury, President of the Building Company, aided by Webber the Architect and G. Wallace Simpson, the nominal mortgagee, as follows:

1. That a completion loan by mortgage had been arranged for in the sum of \$600,000.
2. That the loan could not be procured unless

all contractors waived the right of lien.

3. That all contracts already made contained the waiver clause.

4. That all other contractors would be required to accept the waiver clause.

5. That there was cash on hand for interim construction expenses.

These statements were all false, in this:

First: No \$600,000, loan had been arranged for, in any final sense. The Metropolitan Life Insurance Company's so-called "Commitment" was merely tentative, and not binding on anybody. (Rec. p. 981-5, Ex. 177).

Second: The condition made by the Metropolitan Life Insurance Company did not require a general lien waiver at all. The clause referring to this matter is on page 984 of the record, and reads:

"Contracts entered into for the construction of the building should contain a clause subordinating the contractor's right of lien to the lien of our mortgage."

This "Commitment" had been in the possession of the Bank and Building Company since Nov. 7, 1919, the representations being made in February afterward; and on February 10, 1920, it was before the Bank's Board of Directors when it passed its resolutions covering the transfer of Lots 11 and 12 to the Building Company, wherein it

recited that it would be necessary that the first mortgage of \$600,000, be executed and recorded—

“before any work or construction of the building shall commence and *before any contract shall have been let for the erection or construction of said building.*” (Rec. p. 1008; Ex. 181).

The Receiver's Brief p. 6 and Duke's p. 15, refer to the “Commitment”, Ex. 177, and quote its language as above set forth as the justification for the waiver clause in the contracts.

Thus, the demand of the Metropolitan Company was only that contracts be *subordinated to its mortgage*, not that contractors waive all their lien rights. The mortgage was, in fact, not executed and recorded until March 10th, (Rec. p. 136, Ex. Y) long after every contract we know of had been executed; but it was recorded before any contractor had commenced work on the building and its presence on the public records was sufficient to subordinate any liens for such work to its provisions, if it had ever become of any effect. Therefore there was no necessity for any waiver clause in the contract.

Third: It was not true that all contracts theretofore entered into contained a waiver clause. Several contractors had peremptorily refused, and the clause had been erased from their contracts. Notably was this true in the cases of McClintic-Marshall Company, the largest contractor of all, covering some \$263,000 worth of material (Rec. p.

31) which contract was made February 5th.

Fourth: Neither was it true that it was the intention to exact the waiver clause from all contractors. This appellant's contract was signed February 27th, but on the next day two equally important ones were executed, viz: Far West Clay Company for \$29,000 and Washington Brick, Lime & Sewer Company for \$99,000, (Rec. pp. 535 and 270) without the clause. And there must have been several others.

Fifth: There was no cash on hand and absolutely no resource for any; and it was entirely concealed from contractors that it had been arranged for the Building Company to execute a second mortgage for \$750,000, of which the Bank would take \$350,000 for purchase price of lots.

Estoppel Against Assertion of Waiver

There are several ways of presenting such a state of facts in such a case. This appellant chose that of estoppel, pleaded the facts in its cross-complaint (Par. XXVII, Rec. p. 305), and claimed estoppel of the owners to assert the waiver.

Argument

The principles of estoppel by misrepresentation are well understood; and preliminarily the right to invoke such an estoppel in such a case does not depend upon fraud at all.

The elements for an estoppel are all present here. There were false representations, with actual knowledge of the facts; appellant had no means of knowing the facts; the statements were made for the purpose of persuading appellant to act on them; appellant relied upon and acted upon them exceedingly to its prejudice, if the waiver be sustained, for it led directly to its loss of the valuable right given it by statute; and to place it at a disadvantage with other contractors.

We know of no better resume of the subject than that found in 16 Cyc., commencing on page 722 to 746.

The testimony about these representations was overwhelming, and the Court below held with all the contractors on that point.

Estoppel is approved in cases of Building Contracts and Mechanic's liens.

10 Ruling Case Law p. 804.

This authority cites *Wetzel etc. R. Co. vs. Tennis Bros. Co.*, 145 Fed. 458; 75 C. C. A. 266, which is closely in point here, for it was a case where the owner stopped the contractor's work and claimed that he had lost his right to a lien, by agreeing to accept part of his compensation in certain bonds; and it was held that estoppel lay by reason of the interference. And a closely analogous case is that of *Murray vs. Brown*, 91 U. S. 257, where, on pages 265-6, the Court sustained the contractor's

right to his lien when the owner had refused to convey land which was to be his sole compensation.

In a Washington case, *Pacific Lumber etc. Co. vs. Dailey*, 60 Wash. 566, the contractor had agreed to accept as security a deed of land subject to a mortgage for \$1,200; but when settling time came it appeared that there were three other mortgages aggregating \$1661. on the land, and it was held that the lien attached.

Something has been said in the briefs which we are answering, on the subject of entire contracts; but if our theory of estoppel is correct the matter of entirety can have no bearing, for if the owner is estopped to assert the waiver, it is as though that clause were not in the contract at all. As we said in our open brief, however, we are proceeding on the Statute and not upon any theory of damages or *quantum meruit*.

Other Claimants

This brief is intended to answer the owners who, only, have any right to urge the waiver proposition. Some other lien claimants may seek to argue this matter; but they are not interested.

In the first place, the waiver was not for their benefit, they knew nothing of its existence, until this action was commenced, they never acted upon it, and they were not in privity with it.

Secondly, the claim of this appellant, being that of a contractor, the lowest in the rank of liens, those claimants whose claims are for labor or materials, only, cannot be affected one way or another, whether the waiver clause stands or not.

Seattle Lumber Company vs. Cutler, 63
Wash. 662.

To avoid duplication, we beg to refer the Court for further argument on this question to the brief of Messrs. Flick and Paul in behalf of the Tacoma Millwork Supply Company, pp. 75-82.

Respectfully submitted,

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Attorneys for Ben Olson Company.
Tacoma, Washington.

No. 3953

**In the United States Circuit
Court of Appeals**

For the Ninth Circuit

FORBES P. HASKELL, Jr., as Re-
ceiver of SCANDINAVIAN-AMERI-
CAN BUILDING COMPANY, a Cor-
poration et al.,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY,
a Corporation, et. al.,

Appellees.

**Answering Brief
of McClintic-Marshall Company**

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Filed this.....day of March, 1923.

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By.....Deputy Clerk.

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No. 3953

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For the Ninth Circuit

FORBES P. HASKELL, Jr., as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation et al.,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY,
a Corporation, et. al.,

Appellees.

**Answering Brief
of McClintic-Marshall Company**

STATEMENT OF THE CASE.

The appeal of Forbes P. Haskell, Jr., as Receiver, concerns the McClintic-Marshall Company in two respects, first, insofar as it relates to the arbitration clause in the McClintic-Marshall Company's contract, and second, insofar as it relates to the

effect of the appointment of the Receiver upon the then pending lien foreclosure proceeding. Neither proposition involves any question of fact. The first turns entirely upon the pleadings, the second upon the pleadings and the procedure of the District Court.

By written contract (Exhibit A to Bill of Complaint, Transcript vol. 1, p. 11, received in evidence as Exhibit F, Tr. vol. 2, p. 730), dated February 5, 1920, McClintic-Marshall Company agreed with the Scandinavian-American Building Company to furnish and deliver the structural steel work for the Scandinavian-American Bank Building in Tacoma, Washington, in accordance with plans and specifications prepared by Frederick Webber. By the terms of the contract shipment was to begin within sixty days and to be completed within one hundred and twenty days from the date of said contract. In turn the Building Company agreed to furnish complete and final data for the work to be done by the McClintic-Marshall Company within five days after the date of the agreement, and to pay for such steel 5.9c per ton f. o. b. the contractor's works, but with the then rate of freight allowed to Tacoma, Washington, "In funds current at par in Pittsburgh or New York City, as follows: 85 per cent of the full value of each shipment on the 20th day of the month following date of shipment, remaining 15 per cent thirty days thereafter." (Tr. p. 13.)

The contract contained the following further provisions:

“ARTICLE VI. Failure by the purchaser to make payments at the times stated in this agreement shall give the contractor the right to suspend work until payment is made, or at his option, after thirty (30) days' notice in writing, should the Purchaser continue in default, to terminate this contract and recover the price of all work done and material provided and all damages sustained; and such failure to make payments at the time stated shall be a bar to any claim by the Purchaser against the Contractor for delay in completion of the work.” (Tr. p. 13.)

“ARTICLE X. It is also further agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this Agreement, and the third by the two thus chosen. Each Arbitrator shall be qualified by experience in Engineering and Contracting to perform the duties assigned to him. The decision of any two of these shall be final and binding, and each of the parties to this agreement shall pay one-half of the expense of such reference.” (Tr. p. 15.)

Shipment was not completed within the time specified, nor were payments made for the steel

shipped as agreed upon. Accordingly after delivery of all of the steel called for by this contract McClintic-Marshall Company filed its claim of lien in accordance with the statutes of the State of Washington, Remington's 1915 Code, Sections 1129 to 1148, Remington's 1922 Compiled Statutes, Sections 1129 to 1148, and instituted this action in the court below upon said contract, and to foreclose such lien.

The defendants Scandinavian-American Building Company, Scandinavian-American Bank of Tacoma, Washington, the State Bank Commissioner, and Forbes P. Haskell, Jr., as Deputy State Bank Commissioner, appeared and moved to dismiss the bill of complaint upon the ground (among others) that "a meritorious dispute growing out of said contract" had arisen, that the complainant had refused to arbitrate as provided for in Article X of the contract (*supra*) and, "that by reason of said failure the said complainant is without authority in law or equity to maintain, and is estopped from maintaining, this suit." (Tr. vol. 1, pp. 18 to 20.) This motion was in due course denied. (Tr. vol. 1, p. 21.)

Thereafter upon application of the complainant and of the parties doing business as co-partners under the name and style of Tacoma Mill Work Supply Company, by which name they will be designated hereafter, who had intervened and by their answer and cross complaint (Tr. vol. 1, p. 166), as

well as by separate petition (Tr. vol. 1, p. 47) sought the appointment of a Receiver for the defendant, Scandinavian-American Building Company, "to properly care for the assets of said Building Company, and in particular protect the said building," Forbes P. Haskell, Jr., was appointed as such receiver on March 23, 1921. Following such appointment, upon motion of the Scandinavian-American Building Company, the lower court on May 21, 1921, made this order:

"It is Therefore Ordered, That F. P. Haskell, Jr., be, and he hereby is appointed receiver of the defendant company, and that said receiver be, and he is hereby authorized and directed to take possession of all of the property and assets of the defendant of every kind and description; that said receiver be, and hereby is, authorized and directed to employ such necessary caretakers and assistant as he may deem necessary to protect the property of defendant during receivership; that said receiver file in this action his oath as such receiver in due form of law, and *the* he file a bond as such receiver as required by law for the faithful performance of the duties involved, the amount of which bond shall be in the sum of \$10,000, and shall be approved by this Court." (Tr. vol. 1, pp. 52-3.)

Thereafter on June 19, 1921, the court made a further order *nunc pro tunc*, as of May 21, 1921,

which after reciting the fact of the appointment of the Receiver, and that he was directed to defend all actions or proceedings brought by the various holders of liens and encumbrances, and

“Whereas, it was intended by the said order that the holders of liens and encumbrances on and against the property of the said Scandinavian-American Building Company, involved in the above entitled action, should have leave and authority of this Court to sue the receiver of the said Scandinavian-American Building Company, for the purpose of foreclosing and enforcing their liens against the property of the said Building Company, and the said order was entered partly for that purpose,” (Tr. p. 55.)

provided as follows:

“Now, Therefore, it is ordered that all persons, and particularly the Far West Clay Company, having claims, demands, liens or encumbrances against the property of the Scandinavian-American Building Company, are hereby authorized and empowered to make Forbes P. Haskell, the receiver thereof, a party to the foreclosure for said liens or encumbrances, in the above entitled action, and to sue the said receiver for the said purpose, and to serve on him the necessary papers, processes, or pleadings,

to accomplish said purpose." (Tr. vol. 1, p. 55.)

In the meantime, permission being duly had (see Tr. p. 22) the complainant filed its Amended and Supplemental Bill of Complaint (Tr. vol. 1, p. 23) in which were joined as parties defendant a great number of parties who had, since the filing of the original Bill of Complaint, filed claims of lien against the property involved, and thereafter another order was entered on June 27, 1921, making such receiver a party defendant, and permitting the necessary amendment of the Amended and Supplemental Bill of Complaint. (Tr. vol. 1, p. 57.)

To this Amended Bill the Scandinavian-American Building Company and Forbes P. Haskell, Jr., as its Receiver, made answer, asserting that because of the failure of the complainant to make delivery within the time specified in its contract the Building Company had suffered great loss, that the dispute over such loss was by the express provisions of Article X of the contract to be arbitrated, that demand for such arbitration had been made, and refused, and that therefore the complainant was not entitled to recover anything until the contract had been fully complied with, i. e., by first submitting this alleged dispute to arbitration. (Tr. vol. 1, p. 59.) They further denied that complainant had any right to claim or file any lien, such denial being likewise predicated, though not ex-

pressly so alleged, upon the claimed refusal of arbitration (Tr. p. 60.)

This answer further asserted three items of counter claim: first, an item of \$14,052.76, additional freight occasioned by the increase in freight rates, taking effect before the delayed shipments of steel were made (Tr. pp. 62, 63); second, an item of \$3,000, alleged to be a loss or damage sustained due to faulty fabrication of the steel (Tr. p. 63); and, third, an item of \$50,000, alleged to be the loss in rentals and interest on capital investment resulting from the delay in shipment (Tr. pp. 63, 64), and reiterated the fact of demand for arbitration of these several matters and the complainant's refusal to submit them to arbitration.

The complainant moved to strike the portions of this answer relating to arbitration and the three several items of counter claims. (Tr. vol. 1, p. 141.) This motion was granted save as to the first and second counter claims. (Tr. vol. 1, pp. 66 to 68.)

By way of reply the complainant alleged that the delay in shipment was occasioned by the failure of the Building Company to furnish complete data within five days of the date of the contract, and by other causes beyond its control, all specifically recognized and by the terms of the contract constituting excuses for delay in shipment. (Tr. vol. 1, pp. 69 and 72.)

After hearing evidence the District Court dis-

posed of this claim of breach of the contract by delay in shipment as follows:

“The court has heretofore upheld the jurisdiction of the court and found the arbitration provision inapplicable, and that defendant under the terms of the contract has no right to offset because of loss of rent and interest alleged to have been caused by delays in delivery.

“Under the evidence I conclude that the delays were occasioned by defendant’s failure to furnish details and drawings promptly and that no offset is allowed because of increase in freight charges.” (Tr. vol. 2, p. 459.)

This finding was made effective by paragraph XL of the Decree. (See Tr. vol. 2, p. 336.) The appellant assigns no error on this finding, or upon that portion of the Decree giving effect thereto.

As to the alleged dispute over the faulty fabrication, the lower court found:

“The court finds no evidence of damage to defendant because of defects in fabrication in excess of that conceded by complainant: to-wit, \$2,000.” (Tr. p. 459.)

Appellant assigns no error upon that finding.

The so-called “meritorious dispute” must therefore be now admitted to be *wholly without merit*.

It is perhaps significant that appellant brings no evidence either in the shape of testimony re-

ceived—or proof offered—that any demand for arbitration was made, and none that there ever was any question raised by the Building Company over the defective fabrication.

POINTS AND AUTHORITIES

I. As to the Question of Arbitration.

(1) The jurisdiction of the courts cannot be ousted by the private agreements of individuals made in advance; all such contracts are illegal and void as being contrary to public policy.

Home Ins. Co. vs. Morse, 20 Wall. 445, 22 Law. Ed. 365.

Doyle vs. Cont. Ins. Co., 94 U. S. 535, 24 Law. Ed. 148.

Guaranty Trust Co. vs. Green Cove R. Co., 139 U. S. 137; 35 Law. Ed. 116.

Mitchell vs. Dougherty, 90 Fed. 639.

Kuhnhold vs. Compagnie General Trans Atlantique, 251 Fed. 387.

See generally:

47 L.R.A.N.S. p. 352 and cases there cited.

(2) A general agreement in or collateral to a contract to submit to arbitration any and all controversies that shall arise between the parties and empowering arbitrators finally and conclusively to decide the entire dispute, and every question of law or fact in the proceeding is voidable at will.

“Parties will not be permitted by agreement to submit to arbitration, to oust the jurisdiction of the courts, whether the agreement relates to existing differences or to those which may arise in the future. In other words, the courts may disregard such agreements, assume jurisdiction, and determine matters in dispute which constitute the subject matter of the agreement on the principle that the parties cannot deprive themselves of the right to resort to the proper legal tribunals for the submission of their controversies.”

“An agreement to submit to arbitration not consummated by award is no bar to a suit at law or in equity concerning the subject matter submitted, and the rule applies both in respect of agreements to submit existing differences and agreements to submit differences which may arise in the future.”

5 *C. J. Arbitration and Award*, pp. 20 and 42.

“It is settled that a provision or agreement in an executory contract that any dispute which may arise thereunder shall be submitted to arbitration, will not, in the language of the authorities, ‘oust the courts of their jurisdiction,’ or in other words, bar a suit, either at law or in equity. Such an agreement is said to be contrary to public policy.”

2 *R. C. L. Arbitration and Award*, Sec. 11, p. 360.

"The question is presented whether an action will lie in view of a clause contained in the proposal for the submission of differences to a board of arbitration. The clause is as follows:

'In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.'

This stipulation falls within the general rule laid down in *Holmes vs. Richet*, 56 Cal. 307, 38 Am. Rep. 54, and not the exception. The general rule is, using the language of that case, that:

'An agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement.' "

American Pac. Construction Co. vs. Modern Steel Co., 211 Fed. 849, at 855 (C. C. A. 9th Cir.)

"It is the rule that a naked executory agreement (not under authority of statute or rule of court) made after the arising of a dispute to submit the same to arbitration, is revocable

at will by either party in advance of the actual carrying out of the agreement by arbitration, and the award thereon. It is also the rule, even in case of agreement to arbitrate made before the arising of the dispute and in connection with the contract out of which it is anticipated a dispute may arise (as in contracts of insurance), that when the agreement for arbitration is merely collateral to and independent of the other provisions of the contract, such arbitration is not a condition precedent to the right to sue for a breach of such provisions, and that in such cases the remedy for refusal to arbitrate is by action for breach of that agreement."

Memphis Trust Co. vs. Brown, Ketchum Iron Works, 166 Fed. 398, at 402 (C. C. A. 6th Cir.)

"A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton vs. Liverpool & L. & G. Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But where no

such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. *Roper vs. Lendon*, 1 El. & El. 825; *Collins vs. Locke*, L. R. 4 App. Cas. 674; *Dawson vs. Fitzgerald*, L. R. 1 Exch. Div. 257; *Reed vs. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Seward vs. Rochester*, 109 N. Y. 164; *Birmingham F. Ins. Co., vs. Pulver*, 126 Ill. 329, 338; *Crossley vs. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30."

Hamilton vs. Home Ins. Co., 137 U. S. 370;
34 Law. Ed. 708 at p. 713.

Knoche vs. Chicago, Milwaukee & St. P. Ry. Co., 34 Fed. 471.

Mitchell vs. Dougherty, 90 Fed. 639.

Munson vs. Straits of Dover, 99 Fed. 787.

U. S. Asphalt R. Co. vs. Trinidad Lake P. Co., 222 Fed. 1006.

The Eros, 241 Fed. 186.

Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten, 232 Fed. 403, 250 Fed. 935.

Meacham vs. Jamestown R. R. Co., 211 N. Y. 346, 105 N. E. 653.

See also:

47 L. R. A. N. S., at p. 354, and cases there cited.

(3) Irrespective of the merits of the rule or the validity of the reasons originally assigned for it, it has become the settled law of the courts of the United States.

U. S. Asphalt R. Co. vs. Trinidad Lake P. Co., 222 Fed. 1006.

Atlantic Fruit Co. vs. Red Cross Line, 276 Fed. 319.

Aktieselskabet Korn-og, etc., vs. Rederiaktiebolaget Atlanten, 64 L. Ed. 586; 252 U. S. 314.

(4) Article X of the contract does not impose a condition precedent, but is collateral only, and hence does not bar a suit on the contract or for its breach.

Hamilton vs. Home Insurance Co., 137 U. S. 370, 34 Law. Ed. 708.

Munson vs. Straits of Dover, 90 Fed. 787, 102 Fed. 926.

“This clause cannot be regarded as condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall ‘settle’—that is, dispose of—the dispute. The case therefore does not fall within the decisions which hold that agreements such as to ascertain the amount or the extent of the claim by arbitration as a

condition precedent to a suit in the courts, are valid because the question of liability is left to be determined by the court."

Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten, 232 Fed. 403; 250 Fed. 935, at 937. (C. C. A. 2nd Cir.)

(5) Federal courts decide questions of general law, such as is the question of the effect to be given a provision for arbitration, for themselves, and are not bound by decisions of state courts.

"If a question depends upon principles of general jurisprudence or rests upon general or commercial law, the Federal Courts will decide for themselves and are not bound by state decisions. * * * Among questions of general law as to which the Federal Courts exercise their independent judgment, regardless of state decisions * * * may be mentioned questions relating to * * * validity of an arbitration agreement to oust the court's jurisdiction."

25 C. J., *Federal Courts*, 846 to 849.

"On any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches

only by reason of the citizenship of the parties in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state. *New York Cent. R. Co., vs. Lockwood*, 84 U. S. 17 Wall. 357, 368 (21:627, 636); *Myrick vs. Mich. Cent. R. Co.*, 107 U. S. 102 (27:325); *Carpenter vs. Providence Washington Ins. Co.*, 41 U. S. 16 Pet. 495, 511 (10:1044); *Swift vs. Tyson*, 41 U. S. 16 Pet. 1 (10:865); *Brooklyn City & N. R. Co. vs. Nat. Bank of the Republic*, 102 U. S. 14 (26:61); *Burgess vs. Seligman*, 107 U. S. 20, 33 (27:359, 365); *Smith vs. Alabama*, 124 U. S. 465, 478 (31:508, 512); *Bucher vs. Cheshire R. Co.*, 125 U. S. 555, 583, (31:795, 798). The decisions of the state courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution of the United States."

Liverpool & Great Western Steam Co. vs. Phoenix Ins. Co., 129 U. S. 397; 32 Law. Ed. 788, at 793.

"The question as to what is a matter of local and what of general law, and the extent to which in the latter this court should follow the decisions of the state courts, has often been presented. The unvarying rule is that in mat-

ters of the latter class this court, while leaning towards an agreement with the views of the state courts, always exercises an independent judgment."

Baltimore & O. R. Co. vs. Baugh 149 U. S. 369; 37 L. Ed. 772, at 774.

"This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the state courts which may have exercised their judgment upon the same subject. *Swift vs. Tyson*, 16 Pet. 19."

U. S. vs. Muscatine, 75 U. S. 675; 19 Law. Ed. 490, at p. 494.

"We have not felt called upon to discuss in detail the several Pennsylvania cases which have been urged upon our attention by the learned counsel for the defendant in error. The question before us is not as to the enforcement of the contract in accordance with the law of the place where it was made, but is as to whether a court of the United States should because of the parties' agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all. Upon this question the decisions of the Supreme Court of the United States are controlling, and they admit of but one conclusion."

Mitchell vs. Dougherty, 90 Fed. 639, at 645.
(C. C. A. 3rd Cir.)

“The question presented by these motions is to be regarded as one of general law; i. e., one wherein the courts of the United States are not bound to follow or conform to the decisions of the state jurisdiction in which they may happen to sit. This was intimated by Dallas, J., in *Mitchell vs. Dougherty*, 90 Fed. 639, 33 C. C. A. 205, and explicitly held in *Jefferson Fire Ins. Co. vs. Bierce* (C. C.), 183 Fed. 588.”

U. S. Asphalt R. Co. vs. Trinidad Lake P. Co., 222 Fed. 1006, at 1011.

Ins. Co. vs. Bierce, 183 Fed. 588.

Aktieselskabet Korn, etc., vs. Rediaktiebolaget Atlanten, 232 Fed. 403; affirmed 250 Fed. 935. (C. C. A. 2nd Cir.)

The Eros, 241 Fed. 186.

Atlantic Fruit Co. vs. Red Cross Line, 276 Fed. 319.

(6) The general law governing any contract having been determined, the courts of the United States will give effect to such remedies as are afforded by the particular laws of the state wherein such contract is sought to be enforced.

National P. Co. vs. Bredel Co., 193 Fed. 887.

II. As to the Effect of the Appointment of Receiver.

(1) Receiver's possession is subject to all valid and existing liens upon the property at the time

of his appointment, which does not divest a lien previously acquired in good faith.

High, Receivers, 4th Ed., sections 138 and 440.

23 *R. C. L., Receivers*, secs. 51 and 118.

(2) Such lien may be enforced even after appointment with leave of the court appointing the Receiver.

High, Receivers, 4th Ed., sec. 139.

Chesapeake Coal Co. vs. Black, 224 Fed. 924.

Commonwealth R. Co. vs. Trust Co., 135 Fed. 984.

Schmidtman vs. Atlantic Phosphate Corp., 230 Fed. 769.

Randall vs. Wagner Glass Co., 94 N. E. 739.

Foster Federal Practice (6th Ed.), vol. II, p. 1614.

(3) Leave to prosecute the foreclosure proceedings and to sue the receiver was expressly given.

(See Order May 21, 1921, Tr. vol. 1, p. 53; Order June 14, 1921, Tr. vol. 1, p. 54; Order June 27, 1921, Tr. vol. 1, p. 57.)

ARGUMENT.

The Arbitration Question.

Appellant in dealing with this question assigns five reasons why the arbitration clause in appellee's contract should have been given effect. He as-

serts, first, that the action instituted by complainant is local, and that therefore the Washington law controls, and, second, that the arbitration clause in the particular application sought to be made of it will merely settle an incidental question arising in the course of the execution of the contract, leaving the parties to resort to the courts to enforce the result of that arbitration by proceedings to foreclose their claim of lien.

(See Receiver's opening brief, pp. 26 and 27.)

The arbitration clause in question by its terms applies to all disputes whatsoever, whether of fact or of law. It is general and all embracing. The appellant seeks to place his own limitation thereon, by the application of this clause to the determination of a particular dispute or disputes. The effect of such clauses is not to be determined by the results which would happen if applied to a particular situation, but by consideration of the disputes or questions to which by their terms they may apply. (Cf. application of the rule against perpetuities.) If the provision for arbitration by its terms is not a condition precedent to the maintenance of suit, is not by its terms limited to the determination of particular facts, for example, a provision that an engineer or architect shall determine the quantity or quality of work done, but on the contrary, if, as here, it extends to all possible questions or disputes "growing out of" the agreement in which it is embodied, then it is invalid.

See authorities cited, *supra*, pp. 12-17 inc.

In making their first point counsel for appellant blind themselves to the very distinction marked in making their second. The arbitration clause provides for settlement of any and all liability on the contract. The remedy for such liability e. g., the foreclosure of a lien, can only be had through the courts. Arbitration is in no manner concerned with it. The arbitrators could not, even assuming the arbitration clause binding, decide whether or not a lien existed, since that right does not depend upon the contract but upon compliance with the conditions of the statute, which are extraneous to the contract. Nor could the arbitrators enforce the lien should they determine that the complainant was entitled to one. That remedy must be sought through the courts and in the enforcement of that remedy the local law for the first time comes into play.

With respect to the claim of McClintic-Marshall Company, appellee here, there are two questions to be determined: (a) The amount due, which is a question of substantive rights; (b) the manner of collection, which is here a question of special remedial rights given by local statute. On the former question the federal courts exercise their independent judgment. On the latter they are bound by the local law in determining the applicability and extent of the remedy sought.

This distinction was recognized and given effect

to by the district court's ruling upon the motion to strike the defense based upon the arbitration clause. His decision on this point is in the following language:

"If it be conceded that a different rule obtains in the two jurisdictions (i. e., the Washington state courts and the federal courts), yet the construction of the contract in which the arbitration clause appears is a matter of general law in which the federal courts are not bound by the common law of the state. The court concludes that the lien for materials furnished under the contract is an incident of the contract rather than the contract being an incident of the lien, and that it, therefore, follows that the question of the state's rule as to the effect of arbitration provisions in contracts is inapplicable to this controversy. For this reason paragraphs 1, 2 and 3 of the motion to strike will be granted."

Here as in every case of arbitration and award the award depends for its enforcement upon the courts. The particular manner of enforcement depends upon the availability of one or more particular remedies created by local statutes. It follows obviously that we have neither quarrel nor concern with the cases cited by the appellant under his first point. (See Receiver's opening brief, pp. 28 to 39.) Correctly applied they do not militate against our position in the slightest, and so far as

they have been examined in detail they might well be added to the authorities submitted by us.

It is equally obvious that the fourth point made by the Receiver and discussed in his brief on pages 48 to 51 is neither well taken nor seriously contended for. That the rule we contend for, namely, that a general agreement to submit to arbitration any and all controversies and empowering the arbitrators finally and conclusively to decide the entire dispute, is voidable at will, is the settled law of the courts of the United States, is conclusively established by the very decision cited by the Receiver, namely, *Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten*, 64 Law. Ed. 586, 252 U. S. 314. As counsel very kindly point out, in that case the Supreme Court of the United States was asked to reconsider the rule established with respect to arbitration agreements and reverse the position theretofore taken. In declining to do so Mr. Justice Holmes said:

“With regard to the arbitration clause, we shall not consider the general question whether a greater effect should not be given to such clauses than formerly was done, since it is not necessary to do so in order to decide the case before us.”

Therefore we shall not burden the court with any discussion of the authorities cited by us upon this point, deeming it sufficiently clear from the action taken by the Supreme Court in the case cited that

the rule is recognized and established. In connection with the argument made upon this point counsel assert (Receiver's opening brief, p. 51) that it was directly decided in the case of *New York Lumber Co. vs. Schneider*, 1 N. Y. Sup. 441, and affirmed in 24 N. E. 4 (erroneously cited as 27 N. E. 4) that a clause whereby a contractor agrees to arbitrate all matters of dispute arising under the contract is a waiver of the right to file a lien. An examination of that case will show that the action was brought to foreclose a mechanics' lien to which there was interposed a plea of arbitration and award, which was held good and the complaint was dismissed. The plaintiff appealed, insisting upon his right to maintain his action upon *his original cause of action* to the disregard of the award. The court of appeals in sustaining the action of the lower court said:

"If the award which is relied upon by the defendants in defense of this action is unaffected and not avoided by anything appearing in the record before us, it was a complete bar to the maintenance of any action upon the original right or cause. For the original cause of action, as the result of arbitration there was substituted this award, which is a new right with corresponding obligations. The original right and cause of action arising out of the contract disappeared; or rather merged in this award."

But the plaintiff contended that the award did not pass upon all matters in dispute, and therefore was not binding, and that the whole question could therefore be reopened, as to which the court of appeals said:

“I think the rule should be a settled one that the submission by parties of all matters in dispute growing out of a particular transaction or contract will estop them from thereafter claiming that the award is not conclusive, if its language and terms when fairly regarded are comprehensive.”

That this case has no bearing upon the question thus becomes apparent. The report of this case in 1 N.Y. Supplement was cited to the court below, but when Judge Cushman's attention was called to the decision of the Court of Appeals he turned to counsel for the Receiver and said: “If counsel have any more overruled cases to cite let them produce them now.”

Under the second reason given by the Receiver why the arbitration clause should be upheld it is argued that the clause is a condition precedent. (See Receiver's opening brief, pp. 39 to 45.) We know of no better and more conclusive answer to such a contention than the statement of the Supreme Court in *Hamilton vs. Home Insurance Co.*, 137 U. S. 370, 34 Law. Ed. 708, at p. 713, as follows:

“A provision, in a contract for the payment

of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton vs Liverpool & L. & G. Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action."

But if specific and even more pointed authority is desired it is not wanting. Speaking to this point with regard to a similar provision the Circuit Court of Appeals for the Second Circuit in *Aktieselskabet Korn, etc., vs. Rederiaktiebolaget Atlanten*, 232 Fed. 403, 250 Fed. 935, at 937, said:

"This clause cannot be regarded as condition precedent to the maintenance of a subsequent suit in the courts because it provides that the arbitrators shall 'settle'—that is, dispose of — the dispute. The case therefore does not fall within the decisions which hold that agreements such as to ascertain the amount or the extent of the claim by arbitration as a condition precedent to a suit in the courts, are valid because the question of liability is left to be determined by the court."

Counsel, however, insist that the case of *Memphis Trust Co. vs. Brown Ketchum Fire Works*,

166 Fed 398, is on all fours with the case at bar. With such position we cannot agree. In that case the contract provided that the architect should determine in case of dispute "what should be deducted on account of defective work, or what should be deducted or added on account of changes in the drawings or specifications, or the value of extra work, or the amount of additional time to be allowed to the contractor for the completion of the work, or in any other case or contingency whatsoever in which a dispute should arise in regard to the conditions or proper interpretation of the agreement," and that "his decision shall in all such cases be final and binding on the parties." A dispute having arisen between the parties over certain extras claimed by the contractors and over certain deductions claimed by the owners, an agreement was made for the substitution of one Graham in place of the architect named as the arbitrator, the agreement of substitution expressly providing "that the submission to such arbitration should be a condition precedent to any suit brought by either party against the other." The contractors refused to go on with the arbitration, which however proceeded to an award, which the contractors repudiated and brought their action asking that it be set aside, and that they might have a decree for the amount of their original claims. The lower court held that the agreement to arbitrate had been revoked, and entered judgment for the amount claimed by the contractors. The Circuit Court of Ap-

peals for the Sixth Circuit reversed this decision, holding that this particular agreement to arbitrate did not come within the rule as to general and all embracing arbitration agreements, but that it fell within that class of agreements providing that disputes over specific questions such as the quantity, quality, price, workmanship, value of the work, amount of the loss and damage, should be submitted to arbitration, and the determination of the amount, kind or quality thus made shall be a condition precedent to any action upon the contract, and that hence the agreement to arbitrate was binding and not subject to revocation. The Circuit Court of Appeals, however, expressly recognized and stated the rule which we contend for (see Ante pp. 14-15).

The Receiver now seeks to have the arbitration clause here involved classified among those limited provisions for arbitration which are upheld, and contends that the particular dispute over which it is claimed arbitration was here demanded is one which could be properly and validly submitted to arbitration as a condition precedent. It may very well be that had the provision for arbitration in appellee's contract been so limited it would have been upheld as a binding condition precedent, but as before stated its effect cannot be governed by the particular application sought to be made of it when by its terms it is not so limited. It needs no argument to demonstrate that the arbitration clause here in question cannot be brought within the nar-

row compass contended for by the appellant. A reading of the provision itself is a sufficient demonstration. (See Ante p. 5.) Rather than falling within the narrow or limited class of case this clause falls within the general rule recognized and given effect to by this court in *American Pacific Construction Co. vs. Modern Steel Co.*, 211 Fed. 849, at p. 855, as follows:

“The question is presented whether an action will lie in view of a clause contained in the proposal for submission of differences to a board of arbitration. The clause is as follows:

‘In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.’

This stipulation falls within the general rule laid down in *Holmes vs. Richet*, 56 Cal. 307, 38 Am. Rep. 54, and not the exception. The general rule is, using the language of that case, that:

‘An agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement.’ ”

In connection with this point certain statements are made by the Receiver on page 45 of his opening brief, which cannot be permitted to pass unchallenged. It is said:

“It (McClintic-Marshall Company) did not ship the steel in accordance with the terms of the contract.”

Yet the lower court found to the contrary, and specifically that the delay in shipment was due to the Building Company's own fault. The Receiver does not question that finding with any proper or appropriate assignment of error, nor does he bring to this court any of the testimony on which that finding rests. It is with poor grace that he makes such an unwarranted statement. The statement is then made that the McClintic-Marshall Company admitted that a part of the steel was improperly fabricated. To be fair it should be added that with that admission went a consent that the amount of its claim should be reduced by the damage caused by such faulty fabrication, and the claim was so reduced. It is impossible for us to understand how the Building Company was thereby damaged, since it is not contended here that the damage due to such faulty fabrication was greater than that conceded and allowed. It is next asserted that the McClintic-Marshall Company admitted “that after it was in default, but before it shipped the steel, it refused to arbitrate.” With all due deference, this statement like the first above quoted is false.

The complainant never admitted that it was in default in the shipment of steel, and its contention as above pointed out was sustained by the lower court and is not now questioned. By the same token we deny that it ever refused to arbitrate. This court will search the record before it in vain to find any evidence of any demand for arbitration, much less any admission of refusal to arbitrate. The letters quoted at length in the Receiver's opening brief (pp. 10 to 20 inclusive) contain no reference whatsoever to the question of arbitration. For the most part they do not even proceed from the Building Company, but from the president of the Scandinavian-American Bank, an entirely separate institution, according to the contention of counsel for the Receiver of the Building Company and for the Bank Commissioner and his deputy. The only place where it is asserted that arbitration was demanded and refused is in the answer of the Building Company, and its Receiver, and again in the answer of the Bank and the Supervisor, and those allegations were by order of the lower court stricken.

Counsel at the same place in their brief complain that the Building Company in the events which happened must perforce submit to the filing and foreclosure of a lien, with the great expense consequent thereto, and it is of course true that due to the failure of the Bank and the consequent failure of the building project the foreclosure of the lien was inevitable, but that incident does not affect

the proposition that had the Building Company been solvent and able to pay the just claims against it, it could have come into court in answer to the complainant's bill and tendered the amount which it admitted to be due, in which event, had its contentions been sustained, there would have been no foreclosure of the lien and no consequent expense. The lower court found against him on every contention of fact which the Receiver made, and the latter apparently is content to abide by such findings. As the record stands, therefore, it was the Building Company which was in default, which had breached its contract, and what rule of public policy, so blindly invoked by counsel, is there which will say that the defaulting party should not bear the consequences of his breach?

As a third point on this question the Receiver argues that a breach of the arbitration clause was a bar to the prosecution of this case in an equitable proceeding. (See Receiver's opening brief, pp. 45 to 48.) The equitable maxim that "He who comes into equity must come with clean hands," is invoked in support of this point. If we understand the argument aright, it is briefly that the Washington law or the equity enforced by the Washington courts will bar an action until the arbitration has been carried out or refused by the party to whom it is tendered, and that this rule of law of the Washington court therefore closes the door of the federal courts to a party otherwise entitled to

admittance therein. The claim is wholly without merit.

“It may not be doubted that judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form directly or indirectly destroy, abridge, limit or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it.”

Harrison vs. St. Louis R. Co., 232 U. S. 318;
58 L. Ed. 621, at p. 624.

“Being a suit of a civil nature in equity no state practice or statute or adjudication could deprive a citizen of another state of his right to have it tried by the courts of the United States.” (Citing numerous decisions.)

North Carolina Pub. Serv. Co. vs. Southern Power Co., 282 Fed. 837; at 840 (C. C. A. 4th Cir).

“It is not within the power of the states to limit the jurisdiction of the national courts to entertain a suit.” (Citing cases.)

Boatman's Bank vs. Fritzlen, 221 Fed. 154,
at p. 1160.

The argument on this point is another *non se-*

quitur, with which the briefs filed by the counsel appearing for the Receiver of the Building Company abound. The rule which, as they assert sullies the hands of complainant and produces their cry of "Unclean, unclean," is a rule unrecognized by the federal courts. In enforcing the clean hand maxim or the one requiring equity to be done before equity is sought a court will naturally only give effect to those equities which are known to and recognized by it. The maxim therefore fails of application in a case where it is sought as an aid to require the doing of something which may be considered equitable in a state court, but which, if not considered inequitable in the federal courts is at least considered of no effect at all. Finally, upon this point, counsel rely upon the case of *Cole vs. Cunningham*, 33 Law. Ed. 538. The same case is cited and relied upon by the same counsel in the brief filed by them on behalf of J. P. Duke as Supervisor, and others. (See that brief, p. 160.) In that case the Supreme Court of the United States affirmed the action of the Supreme Court of Massachusetts, which enjoined a citizen of that state who had participated in insolvency proceedings under the state laws from obtaining by attachment in New York a prior lien upon property of the debtor. The effect of such attachment if obtained would have been to have given a preference to the attaching creditor, contrary to the Massachusetts law, and would have operated to deprive the other creditors of the debtor of an equal share in the distribution

of the property so attached. To state that case is to prove it inapposite.

Much more in point is the decision of the Circuit Court of Appeals for the Third Circuit, in *Mitchell vs. Dougherty*, 90 Fed. 639. In that case there was involved a contract made in the state of Pennsylvania, and to be performed therein, containing a provision for arbitration by an architect. The lower court apparently relied upon certain Pennsylvania cases. Its decision, however, was reversed, the conclusion of the Circuit Court of Appeals being thus stated:

“We have not felt called upon to discuss in detail the several Pennsylvania cases which have been urged upon our attention by the learned counsel for defendant in error. The question before us is not as to the enforcement of the contract in accordance with the law of the place where it was made, but is as to whether a court of the United States should because of the parties’ agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all. Upon this question the decisions of the Supreme Court of the United States are controlling, and they admit of but one conclusion.” (Opinion at page 645.)

Effect of the Appointment of a Receiver.

Counsel for the Receiver in their statement of the case, whether inadvertently or through design,

omit all reference to the order of the lower court entered June 19, 1921, and appearing on page 55 of the record. (See Ante p. 8.) By reference to that order in conjunction with the allegations made in the original answer of the Tacoma Millwork Supply Company (Tr. p. 166) it will be at once apparent that the appointment of the Receiver was not intended in any way to curtail the right to proceed with the lien foreclosure proceedings, but that such appointment was sought in aid thereof, and that leave to proceed with the lien foreclosure proceedings was expressly granted, the order reading:

“Now, Therefore, it is ordered that all persons, and particularly the Far West Clay Company, having claims, demands, liens or encumbrances, against the property of the Scandinavian-American Building Company, are hereby authorized and empowered to make Forbes P. Haskell, the receiver thereof, a party to the foreclosure for said liens or encumbrances, in the above entitled action, and to sue the said receiver for the said purpose, and to serve on him the necessary papers, processes, or pleadings, to accomplish said purpose.” (Tr. vol. 1, p. 55.)

Moreover it would seem worthy of comment that the same counsel who as attorneys for the Receiver of the Building Company are crying out against the action of the lower court in permitting the lien

claimants to proceed with their lien foreclosure proceedings, are as counsel for the Bank Supervisor and his Deputy asking this court, not only to permit them to foreclose certain mortgages in this proceeding, but that this court should decree such mortgages to be liens superior to the rights of the lien claimants, award them attorneys' fees in such proceeding, and thereby exclude the lien claimants from any actual relief whatsoever. They will undoubtedly say in reply that all they are seeking is to have their claims determined to be prior liens, and to be first paid out of the proceeds of the building, which may be realized by the Receiver of the Building Company, but such was not their position in the court below, and such is not their position in their opening brief on behalf of the Bank Supervisor. What is sauce for the goose should be sauce for the gander, and a court of equity should not listen with much patience to a claim asserted by counsel when they are on one side of the fence, and denied by the same counsel when they are on the other. However, and be that as it may, the authorities cited by counsel go no farther than to show that where a general receiver for a corporation has been appointed it is proper to ascertain the various claims against the corporation in the receivership proceeding, and there to determine their respective priorities and to provide for their payment in the order of the priority thus determined, out of any sums realized by the

Receiver from the corporate assets. None of them deny the right to permit the foreclosure proceedings to proceed, and all the authorities recognize that the appointment of a receiver does not divest or impair existing liens. The erroneousness of the lower court's procedure is not and cannot be demonstrated merely by showing that another course could properly have been followed. Such other course must be shown to be exclusive—which counsel for appellant do not claim for their suggested procedure.

In considering this question the court should bear in mind that the sole assets of the Building Company consisted of the lots and the steel skeleton erected thereon; that for all practical purposes there was nothing for the general creditors of the corporation; that the contest was solely between parties claiming liens of one kind or another; that in some form or other the validity of those liens would have to be determined; that proceedings in the regular way for the establishment of some, if not all, of those liens had been commenced prior to the appointment of any receiver, and that, inasmuch as those lien claims involved conflicting claims of priority, not only as between the liens on the one hand and the mortgages on the other, but also between the several lien claimants themselves, the continuous presence of all the parties would almost certainly be required not only at any series of hearings held by the receiver to determine the validity and priority of any particular lien claims,

but also at the inevitable review thereof by the court. Therefore, in the peculiar circumstances it was in aid of speedy justice and made for the avoidance of the multiplicity of hearings, to proceed in the regular way for the foreclosure of these liens. In such proceedings all parties could be and were present, and all questions were once and for all settled and determined.

The question is wholly one of practice upon a peculiar state of facts. It is not governed by any rule of court, nor by any statute, and consequently rests within the discretion of the court. It is not even remotely asserted that the discretion was abused. Under such circumstances citation of authority would seem to be a work of supererogation. The following certainly will suffice:

“It is important to observe that the receiver’s position is subject to all valid and existing liens upon the property at the time of his appointment and does not divest a lien previously acquired in good faith.”

High, Receivers, 4th Ed., sec. 138.

“The court receives such property, impressed with all existing rights and equities of creditors and the relative rank of claims and standing of liens, unaffected by the receivership.”

23 *R. C. L., Receivers*, sec. 118.

“So by the weight of authority the appointment of a receiver for the defendant in a pending action does not divest the lien which the plaintiff has secured, nor prevent him from proceeding to enforce or foreclose it.”

23 *R. C. L., Receivers*, sec. 51, p. 49.

In *Chesapeake Coal Co. vs. Black, et al.*, 224 Fed. 924, the Circuit Court of Appeals for the Eighth Circuit were considering the right of a claimant who had secured a lien, prior to the appointment by the federal court of a receiver, to proceed to the enforcement thereof. Judge Sanborn, rendering the opinion, said:

“Its liens upon the real estate and upon the money or property held for the furnace company by the railway companies were secured before the receiver was appointed. He and the court that appointed him took the property subject to those liens, and the coal company had both the legal and equitable right until it obtained complete payment of the debt which the furnace company owed it simultaneously to enforce each of those liens against the property, subject to it in any and every court that had or acquired jurisdiction of that property.”
(Opinion at p. 926.)

See also :

Schmidtman vs. Atlantic Phosphate Corp.,
230 Fed. 769 (C. C. A. 2nd Cir.).

“Liens upon the insolvent’s property can be enforced against the receiver except to the extent that he represents the holder of a prior lien.”

Foster Federal Practice (6th Ed.), vol. 2, p.
1614.

In this connection it is significant to note that the Receiver of the Building Company has taken no steps whatsoever to have the claims against the Building Company submitted to him for allowance or rejection. No notice requiring creditors to file claims has ever been given. On the contrary, the Receiver was content to sit from the date of his appointment in March of 1921, until the day when this case was called for trial, and allow the lien claimants to proceed with their foreclosure proceedings without question or objection of any kind, and he has never attempted to realize upon the assets in his hands for the benefit of the lien claimants and the other general creditors of the Building Company.

The objection to the procedure adopted by the trial court made by the Receiver on the day the trial commenced came too late. By failure to interpose it either in his pleadings or by some appro-

priate motion or application made to the court it must be held to have been waived. If the point is not resolved against the Receiver on that ground then it must be under the familiar rule that a Receivership will not be permitted to operate so as to hinder or delay realization by the creditors upon their claims. As demonstrated above, the Receiver has as yet taken no steps by which the creditors could establish their claims, except in the manner they have followed. The only claim of prejudice made by appellants to this course is through the allowance of attorneys' fees. Yet such fees are under the Washington statute an incident to the claim and would have had to have been fixed and allowed by the Receiver had he in due season taken steps to have had these claims proven before him.

The other questions raised by the appeal of the Building Company's Receiver do not affect the McClintic-Marshall Company—there was no lien waiver in its contract. On the contrary the position taken by the Receiver on the lien waiver question has been at all times concurred in by the complainant, and in certain other briefs which will be filed in this cause on behalf of the McClintic-Marshall Company that question will be considered at some length. We therefore will enter into no discussion of it here. We respectfully submit that the action of the lower court with respect to the effect of the arbitration clause, and as to the effect of the appointment of the Receiver was in all respects proper and correct,

and that the decree appealed from should be affirmed.

Respectfully submitted,

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Of Counsel.

No. 3953

**In the United States Circuit
Court of Appeals**

For the Ninth Circuit

WASHINGTON BRICK, LIME &
SEWER PIPE COMPANY, a Cor-
poration,

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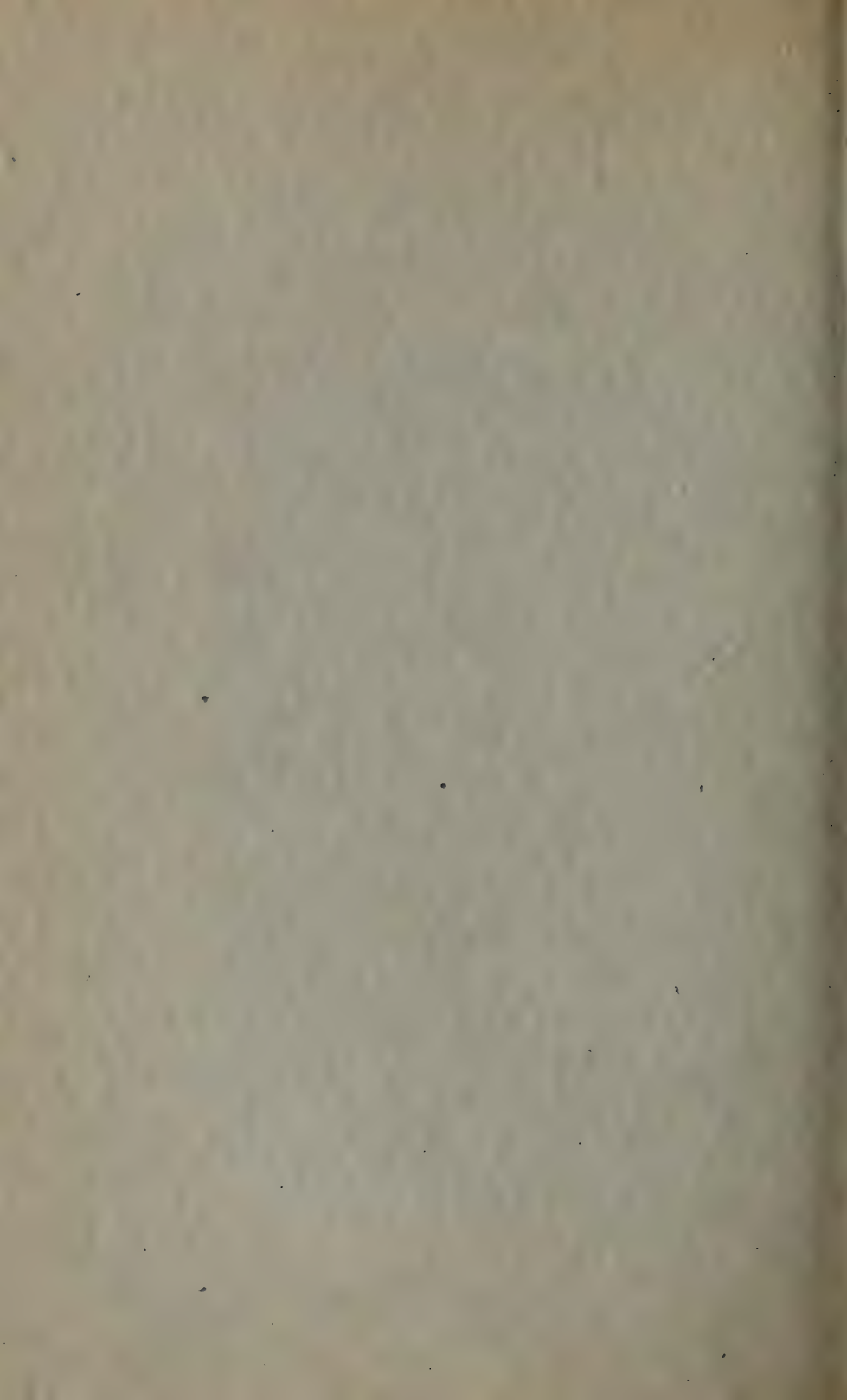
**Answering Brief
of McClintic-Marshall Company**

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STATEMENT OF THE CASE

By written contract, dated February 28, 1920, this appellant agreed to furnish to Scandinavian American Building Company all the terra cotta for the new building for the lump sum of \$109,000. The contract was in the general form of printed

contracts put out by the Building Company, but certain of the provisions of that form were eliminated prior to the execution of the contract, e. g., the lien waiver clause, Article XIV.

None of the terra cotta was delivered to the building site. Thirteen thousand and thirty-five cubic feet out of a total of 24,180, required to fill the contract, was shipped from the appellant's works near Spokane, Washington, and piled in the yards of the Great Northern Railway Company at Tacoma. The balance, in various stages of completion, remained at the appellant's plant.

The questions presented are, broadly, two:

1st. Did the shipment to Tacoma of the materials stored in the Great Northern yards constitute a delivery, or furnishing sufficient to sustain a lien?

2nd. Can the appellant have a lien for specially manufactured materials without delivery to the premises on which the lien is claimed?

The questions of law are thus the same as are presented by the appeal of the Tacoma Millwork Supply Company, uncomplicated by the express waiver of lien. They will not be reargued at length, but we ask this court to refer to and consider on this appeal the argument made in the brief filed by us upon the appeal of Tacoma Millwork Supply Company.

The first question above stated naturally turns

in a large measure upon the special facts disclosed by the evidence. Upon them the District Court found that there was no delivery by the appellant to the Building Company, and that title to none of the terra cotta passed to the Building Company. It is admitted that the terra cotta was all to be specially manufactured for this building; that the contract called for delivery of it at the building site (Exhibit 139, Tr. p. 813; testimony of M. L. Bryan, Tr. p. 798); that appellants were paid \$20,000 before any material was shipped; that the first shipment was made September 17, 1920, and the last on January 13, 1921, (Tr. p. 811); that appellants secured the storage space, paid the rental thereon, and were liable to pay for the loading of the material and its transportation from the storage yard to the building site before they would have fully carried out their contract, and to replace any material that was damaged while in storage, (testimony of A. B. Fosseen, pp. 814, 815, 824 and 825). The reason for the shipment to Tacoma was partly the same as actuated the Tacoma Millwork Supply Company to move some of their material to down-town storage, to-wit, to avoid congestion at the factory, but more particularly to avoid the consequences of a threatened car shortage and an advance in freight rates.

In a letter of November 5, 1920, Mr. Fosseen, the president of the appellant, says:

“We are ready to make shipment of the

contract provided for installment payments as follows:

“75% monthly, to be paid in cash of the estimated value of material delivered, and the balance of 25% to be paid within thirty to sixty days from the completion of this contract.” (See Article I, Tr. p. 856.)

This \$20,000 was paid August 13th upon an estimate of the value of the terra cotta that was finished and ready for shipment, but Mr. Fosseen states his inability to determine what became of the terra cotta ‘that was completed, finished and ready for delivery at the time that the \$20,000 was paid. Part of it is the terra cotta here in Tacoma, and probably a part of it is over there yet. I don’t know what part of it is still over there at Spokane. I know that it is a part of the terra cotta that is in Tacoma that was collected on.” (Tr. p. 821). But as will be seen by a reference to Exhibit 143, the estimate upon which the \$20,000 was paid consists of two items, one terra cotta ready for shipment amounting to \$14,140, the other terra cotta burned and being fitted, amounting to \$15,360. The invoice, Exhibit 143, constituted a demand for seventy-five per cent of the total of these two items, and it was upon that estimate that the \$20,000 was paid. It will be our contention on this point that in view of the fact that demand for an advance or installment payment was made in accordance with the terms of the contract, and the

further fact that the invoice constituting such demand specified a certain quantity of material that was ready or practically ready for shipment, that it will be presumed that the shipments thereafter made were from this material which was then ready for shipment, and that the payment should be applied upon the material thus shipped, with the result that from the value claimed for the material delivered here in Tacoma the payment of \$20,000 must be deducted in fixing the amount for which a lien is to be allowed if such shall be the ultimate holding of this court.

POINTS AND AUTHORITIES

I. Effect of Courts Findings

1. FINDINGS OF FACT IN AN EQUITABLE ACTION, MADE BY THE JUDGE WHO HEARD THE TESTIMONY, WILL NOT BE REVERSED EXCEPT IN A CLEAR CASE.

“While in an equity proceeding of this character an appeal practically affords the litigants a retrial of the questions presented, nevertheless the findings of fact made by the trial court will be accorded great weight. The appellate court will not usually disturb them unless they are clearly erroneous, or there is a preponderance of evidence against them.”

Idaho Mining & Milling Co. vs. Davis, 123 Fed. 396, at 397 (C. C. A. 9th Cir.) (Per Morrow, C. J.)

Remingtons 1922 Comp. Stat. of Wash., Sec. 1129.

2. THE LIEN STATUTE BEING IN DEROGATION OF THE COMMON LAW MUST BE STRICTLY CONSTRUED IN DETERMINING THE PARTIES BENEFITED THEREBY.

Tsutakawa vs. Kumamoto, 53 Wash. 231, at p. 236; 101 Pac. 869.

3. A FEDERAL COURT IN ENFORCING A STATUTORY REMEDY IN THE STATE IN WHICH IT SITS IS BOUND BY THE CONSTRUCTION OF THAT STATUTE PLACED THEREON BY THE HIGHEST COURT OF THE STATE.

Detroit vs. Osborne, 135 U. S. 492; 34 L. Ed. 260;

Northern Pacific Ry. Co. vs. Meese, 239 U. S. 614 60 Law. Ed. 467 at 468, reversing 211 Fed. 254;

Loewe vs. Savings Bank, 236 Fed. 44, affirmed 61 Law. Ed. 360;

In re Seward Dredging Co., 242 Fed. 225; Certiorari denied, 245 U. S. 651; 62 Law. Ed. 531;

Columbia Digger Co. vs. Sparks, 227 Fed. 780 (C. C. A. 9th Cir.);

American Surety Co. vs. Bellingham Nat'l Bank, 254 Fed. 54. (C. C. A. 9th Cir.);

Bank of Follansbee vs. Follansbee Lbr. Co., 248 Fed. 645;

25 C. J. Federal Courts, p. 832, and cases there cited.

4. THE SUPREME COURT OF WASHINGTON HAS CONSTRUED THIS AND COGNATE STATUTES TO REQUIRE ACTUAL DELIVERY UPON THE LIENED PREMISES AS A PREREQUISITE TO A LIEN.

Huttig Bros. vs. Denny Hotel Co., 6 Wash. 122;
32 Pac. 1073;

Fuller vs. Ryan 44 Wash. 385; 87 Pac. 485;
Gate City Lbr. Co. vs. Montesano, 60 Wash.
586, 111 Pac. 799;

Holly-Mason Hardware Co. vs. National Surety Co., 107 Wash. 74; 180 Pac. 901.

See also:

Jacobs Co. vs. Brandt, 44 Wash. 68; 87 Pac. 43;
Crane Co. vs. Farandis, 46 Wash. 436; 90
Pac. 1134;

Tsutakawa vs. Kumamoto, 53 Wash. 231; 101
Pac. 869;

State Bank vs. Ruthe, 90 Wash. 636; 156 Pac.
540;

Ashford vs. Iowa & M. Lbr. Co., 81 Neb. 561;
116 N. W. 272;

Fóster vs. Dohle, 17 Neb. 631; 24 N. W. 208;
Baker Lbr. Co. vs. Marathon Paper Co., 130
N. W. 866; 36 L. R. A. N. S. 875.

5. THERE CAN BE NO LIEN SO LONG AS TITLE TO THE MATERIALS FOR WHICH A LIEN IS CLAIMED REMAINS IN THE CLAIMANT.

(a) The theory of such liens is that the labor or material has gone into and enhanced the value

of the premises or structure against which the lien is claimed.

Lipscomb vs. Exchange Nat'l Bank, 80 Wash. 296;

Foster Lbr. Co. vs. Sigma Chi Chap. House, 97 N. E. 801 ,at p. 803 (Ind.).

(b) The term "furnish" in the lien statute imports a sale and delivery.

Burns vs. Sewell, 51 N. W. 224;

Baker Lbr. Co. vs. Marathon Paper Co., 130 N. W. 866; 36 L. R. A. N. S. 875;

Barnett vs. Stevens, 43 N. W. 661;

Foster Lbr. Co. vs. Sigma Chi Chap. House, 97 N. E. 801;

Richmond Const. Co. vs. Richmond R. Co., 68 Fed. 105, at p. 118;

Williams vs. Chapman, 65 Am. Dec. 669;

Loonie vs. Hogan, 61 Am. Dec. 694.

6. TITLE REMAINED IN APPELLANTS AS TO ALL MATERIALS.

(a) Under appellants' contracts it was the intent that title should not pass until actual incorporation of the materials in the building. (See Articles II, V, XI, and XVII of the contracts, Tr. pp. 747 to 754.)

(b) Title never passes in absence of clear expression of such intent so long as anything remains to be done upon the article sold by the vendor.

35 Cyc. Sales, p. 229;

24 R. C. L., Sales, Sec. 293, p. 31;

Clarkson vs. Stevens, 105 U. S. 505; 27 L. Ed. 139;

River Spinning Co. vs. Atlantic Mills, 155 Fed. 466, at p. 471;

Annotation in 50 L. R. A. N. S. at p. 122.

(c) The contracts being entire, title could not have passed as to the materials completely manufactured without delivery while other materials forming an integral part of the same contract remained wholly or partially incomplete.

Annotation in 50 L. R. A. N. S., at page 128;

North Pac. Lbr. Co., vs. Kerron, 5 Wash. 214;

Meeker vs. Johnson, 3 Wash. 247, 28 Pac. 542.

(d) Delivery to appellant's storage was not such a delivery as effected a change in title.

35 Cyc., Sales, p. 304;

Annotation in 50 L. R. A. N. S., at p. 140;

Pittsburgh C. & St. L. R. Co. vs. Hicks, 19 Am. Repts. 713.

ARGUMENT

As to the Right of Lien

Under the authorities cited, which could be multiplied without limit, it seems idle to attempt to add words of argument based upon the evidence as to the correctness of the lower court's finding that

the shipment to Tacoma was for appellant's benefit and convenience, and to avoid a possible car shortage and increased freight rates.

Assuming that the court's finding will be sustained, for it is really based upon the appellant's own admission, and the conflict, if any, is a conflict in the appellant's own testimony, the case presented is one where there has been neither an actual delivery of any part of the materials to the building site nor any delivery under the contract such as will be effectual to pass title. This situation is fully discussed in our brief upon the appeal of the Tacoma Millwork Company, and there the cases cited by this appellant are also discussed and distinguished. Repetition of that argument and discussion under the circumstances would be burdensome. The request is therefore respectfully made that the authorities there cited and the argument there made be considered upon this appeal to all intents and purposes as though repeated at length here. We are serving that brief upon counsel for Washington Brick, Lime & Sewer Pipe Co., together with this one.

Application of Payments

The Building Company had no dealing with the Washington Brick Lime & Sewer Pipe Company outside of the contract directly involved in this appeal. In other words, there were no debts or obligations due from the Building Company to the

appellant except as created by the said contract. Furthermore at the time of the payment of \$20,000 there was nothing due from the Building Company to the appellant according to the terms of the contract, for neither then nor at any time has there been a delivery of the material as contemplated by the contract and the agreement of the parties. But since this question is material only if this court takes a different view of the shipment of the terra cotta to Tacoma from that taken by the District Court and from that contended for by us, we shall assume for the purpose of discussion of this question that the shipment to Tacoma did constitute a delivery. Upon that basis at the time of the payment of \$20,000 there had been prepared and ready for shipment, though not actually shipped, \$14,140 worth of material. In addition \$15,360 worth of material had been burned and was being fitted preparatory to shipment. It was all but ready for shipment. The appellant in that situation made a demand for payment of seventy-five per cent of the total value of such material "as per terms of contract in Article V." (See Exhibit 143, Tr. p. 823.) That demand was not recognized in its entirety, but in accordance therewith \$20,000 was paid. The demand made by said invoice and the payment based thereon amounts to a direction of application of the amount paid to the items specified.

See:

Koehler vs. Bierbaum, 122 S. W. 524, (Ky.).

Moreover it is well established that in the absence of direction or specific application by the creditor the law will apply the payment made to the oldest account.

“It is undoubtedly the rule as is contended by appellant that if no direction is made by a debtor who owes several accounts, the creditor may apply a payment as he sees fit; and if there be no direction or specific application by the creditor the law will apply it to the oldest account.”

Hughes vs. Flint, 61 Wash. 460, at 462; 112 Pac. 633.

There is no contention made by appellant that at the time this payment was made they made any specific application of it. Their contention is, if we understand it correctly, that after the payment had been made and after the failure of the Building Company, they could then apply the payment to work done by them subsequently to the time of payment, and for which they do not seriously contend they have any right of lien. Their contention is that where there are two debts, one secured and the other unsecured, and the payment is made by the debtor with no direction as to its application, the creditor may apply it to the unsecured debt. This rule presupposes the existence at the time of payment of two debts due and payable, one secured, the other unsecured,—a condition which did not

obtain at the time the \$20,000 payment was made, and this fact distinguishes the authorities cited by counsel on pages 24 and 25 of their brief. The rule which governs in the particular facts of this case is as follows:

“In the absence of an express agreement or an application by the debtor, the trend of authorities is to the effect that as between two debts, one due and one not due, the creditor has no choice, and the application must be on the former; and further a creditor cannot retain a payment to apply on future demands, leaving a prior debt unpaid.”

24 R. C. L., Sales, Sec. 298, at p. 35;

21 R. C. L. *Payments*, Sec. 101, pp. 95 and 96;

McWhorter vs. Bluthenthal, 33 So. 52, 96 Am.

St. Repts. 43 (Ala.);

Cain vs. Vogt, 116 N. W. 786, 128 Am. St

Repts. 216 (Iowa);

Bacon vs. Brown, 4 Am. Dec. 640 (Ky.);

Parks vs. Ingram, 55 Am. Dec. 153 (N. H.);

Sellick vs. Munson, 16 Am. Dec. 689 (Vt.);

Baker vs. Stackpoole, 18 Am. Dec. 508.

What the appellant is really contending for here is the right to retain this payment, and after the failure of the Building Company apply it to the value of the work partially completed subsequent to August 13, 1920.

We suggest to the court that in the light of the

process of manufacture by the appellant, the history of which was detailed at great length, it is an irresistible inference that the terra cotta which was shipped to Tacoma comprised that included in the invoice appearing as Exhibit 143, though it is also true that additional material to that covered by that invoice was also shipped. If that inference be justified then the payment made must in its entirety go to the reduction of the amount claimed for the material in the appellant's storage at Tacoma.

Moreover such conclusion follows necessarily and as a matter of law from the decision of this court in *Columbia Digger Co. vs. Sparks*, 227 Fed. 780. That case was not a mechanic's lien case, but involved the rights of a surety upon a bond furnished by a contractor upon a public work. The bond there was security for the payment of the claims just as in the present case the property under the mechanics lien law is security for the payment of liens. And it was held that the surety was entitled to have the payment made applied to the reduction of indebtedness which was a claim against the bond, notwithstanding an application by the creditor to a pre-existing indebtedness. The same equities exist in the present case in favor of the other lien claimants in this proceeding.

Wherefore we respectfully submit that the judgment of the District Court with respect to the appellant's claim was in all respects correct, and

should be affirmed, but that if any lien is to be allowed at all it cannot in any event, be for more than the value of the materials shipped to and now in storage at Tacoma, less the \$20,000 payment.

Respectfully submitted,

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Marshall Co., Appellee.*

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Of Counsel.

No. 3953
IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as Successor in Office of the Defendant CLAUDE P. HAY, as State Bank Commissioner of the State of Washington, FORBES P. HASKELL, JR., as special Deputy Supervisor of Banks of the State of Washington, and SCANDINAVIAN AMERICAN BANK OF TACOMA, a Corporation,

Appellants,

VS.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

ANSWERING BRIEF OF McCLINTIC-MARSHALL COMPANY

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Filed this.....day of March, 1923

FRANK D. MONCKTON, Clerk.

By.....*FILED*.....Deputy Clerk.

No. 3953

IN THE

United States Circuit Court of Appeals

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Appellees.

ANSWERING BRIEF OF McCLINTIC-MARSHALL COMPANY

PRELIMINARY STATEMENT

This appeal is concerned chiefly and primarily with the establishment of three alleged mortgage liens, known generally to the parties as the \$70,000, or Penn Mutual mortgage, the \$750,000 or Purchase Money mortgage, and the \$600,000 or Metro-

politan Life mortgage. Underlying the separate consideration of these alleged incumbrances is the question of the identity of the two corporations, Scandinavian American Building Company and Scandinavian American Bank of Tacoma. If they are identical, then, as forcibly stated by the Honorable T. L. Stiles in the brief filed by him on the appeal of Ben Olson Company, the obligations created in the name of or resting upon the property of the Building Company were the liabilities of the bank, and the attempt to enforce them in this proceeding is an attempt by an owner to establish and enforce a lien upon his own property.

The facts and argument establishing such identity are so clearly and conclusively set forth by Judge Stiles in the brief referred to (see Brief of Ben Olson Co. pp. 47 to 72) that we shall neither repeat them nor attempt to elaborate thereon. Suffice it to say that we believe that the argument made on behalf of the Supervisor to the effect that the corporations were separate entities is very completely answered, and the converse indisputably established. With the permission of Judge Stiles we therefore ask leave to adopt that portion of his brief as our own. In so doing we do not want to give the impression that we believe the proposition to be of minor importance. On the contrary we are convinced that it is sound and conclusive of the main features of this appeal. We desire merely to avoid what would be poor repetition, at the best.

Similarly the Honorable R. S. Holt is filing a brief in answer to that filed by the Commissioner. This brief deals thoroughly and convincingly with the legal propositions involved in the claims asserted upon said mortgage. We have had the opportunity and benefit of reading it in manuscript, and with Mr. Holt's permission ask leave to adopt that brief also, as our argument upon the questions therein considered. However, owing to the size of the record upon this appeal and the involved state of facts, it is conceived that possibly some assistance can be rendered to this court by a separate brief dealing almost exclusively with the details and the inferences to be drawn therefrom. The main propositions of law need no further elaboration.

In addition to the argument upon these three mortgages the Commissioner in a most cursory manner attacks the District Court's ruling upon the arbitration clause contained in the McClintic-Marshall contract. As that question, however, has been thoroughly discussed in our brief in answer to the opening brief of the Receiver of the Building Company, we shall not repeat it here, but ask the court to refer to our other brief.

In fine, it is the intent to confine this brief to an answer to the assertions of fact relating to the three mortgages, made by counsel for the Commissioner, and to mention legal propositions only incidentally for the sake of clarity, or continuity, or to show the connection with the propositions

discussed by Mr. Holt. In so doing we shall treat the bank and the Building Company as separate and distinct corporations, but without in any way conceding that they are in law or equity separate entities.

ARGUMENT

The Status of Bank Commissioner or Bank Supervisor

It is asserted by counsel for the Bank Commissioner that the Commissioner was not an agent of the bank, but an officer of the State of Washington, all of which is immaterial if true. We are here concerned, not with his status, but with the condition of the bank's assets in his hands. Are they charged with the same equities, liens, incumbrances, and obligations as when being administered by the bank, or does the taking over of the bank by the Commissioner wipe out all previously existing rights, and obligations, legal or equitable, contractual or otherwise, with respect to such property as was taken over by the Bank Commissioner? To state this proposition is to answer it.

Hanson vs. Soderberg, 105 Wash. 255; 177 Pac. 827, so greatly relied upon by the appellants, is to our way of thinking utterly beside the point, since the court was there considering solely the power of the Commissioner or Supervisor "to make an assessment upon the stockholders without a judicial inquiry and determination as to the necessity for such assessment." It was not concerned with the con-

dition of any property of the bank which passed into the hands of the Supervisor or Commissioner upon his taking over the bank, but solely with the super-added liability of the bank's stockholders, created by statute and made a live question when the Commissioner or Supervisor took charge. Such superadded liability was not an asset in the hands of the bank.

On the other hand, the real point involved here is ruled by the decision of the Supreme Court of the State of Washington in *Moore vs. American Savings Bank & Trust Co.*, 111 Wash. 148, 189 Pac. 1010. The following quotation from the opinion rendered in that case will suffice to show its pertinency.

“The insolvency of the bank and the taking possession by the Examiner could not destroy nor affect this lien. He would take possession of the bank subject to all equities and rights existing in any one else. In 34 Cyc. at page 193, it is said:

“‘The general rule is that a receiver takes the property of which he has been appointed in the same plight and condition and subject to the same equities and liens as he finds it in the hands of the person or corporation out of whose possession it is taken.’ In 23 R. C. L., at page 56, it is said:

“‘A receiver holds the property coming

into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment. He becomes merely the assignee of the insolvent, and has exactly the same rights.' ” (111 Wash. pp. 158 and 159.)

That, with respect to the assets coming into his hands from the bank, as distinguished from the moneys received by him as a result of an assessment levied upon the stockholders, the Commissioner's functions as a receiver follows also from section 3269 of Remington's 1922 Compiled Statutes (quoted as section 3268 on page 42 of appellant's brief) as follows:

“Upon taking possession of any bank or trust company, the examiner shall proceed to collect the assets thereof, and to preserve, administer and liquidate the business and assets of such corporation. With the approval of the superior court of the county in which such corporation is located, he may sell, compound or compromise bad or doubtful debts and upon such terms as the court shall direct sell all real estate and personal property of such corporation. He shall deliver to each purchaser an appropriate deed or other instrument of title. If real estate is situated outside of said county, a certified copy of the orders authorizing and confirming the sale thereof shall be filed for record in the office

of the auditor of the county in which such property is situated. He may appoint special deputy examiners and other necessary agents to assist in the administration and liquidation of such corporation, a certificate of such appointment to be filed with the clerk of the county in which such corporation is located. He shall require each special deputy to give a surety company bond, conditioned as he shall provide, the premium of which shall be paid out of the assets of such corporation. He may also employ an attorney for legal assistance in such administration and liquidation. (L. '17, p. 301, sec. 62. Cf. L. 1915, p. 280, sec. 3.)"

On the theory now advanced by the Commissioner, we inquire what was the occasion or necessity for applying to the Superior Court of the State of Washington for authority "to take up by assignment or otherwise" the \$70,000 mortgage. Yet the Commissioner, just as any receiver would have done, applied to the court for authority and direction in this matter. (See Order, Exhibit No. 335, Tr. p. 1217.)

Commissioner's Intention in Taking Assignment of \$70,000 Mortgage

It is asserted that there was no intention to pay this mortgage, and discharge the lien thereof. (Appellant's brief, p. 65 et seq.) Yet the trial court found otherwise as follows:

"Mr. Haskell, the Receiver of the bank—not as Receiver of the Building Company, acquired a note and mortgage of the Building Company for \$70,000. This mortgage was outstanding at the time the various contracts relating to the construction of the building were made. The Receiver's purpose was to protect the property from foreclosure of the underlying mortgage, and in form it was a purchase by him.

* * *

"The bank's Receiver in taking up this mortgage was merely seeking to prevent the further increase of claims against the trust estate in his hands which, if suffered, would result in the dilution of the assets, and could not but prejudice the depositors and other creditors of the bank. Under these circumstances to hold the bank's receiver's action, in taking up the underlying mortgage, a purchase whereby he escaped liability upon the warranty, and also secured a position of advantage where he could defeat the lien claimants, not only has no equity in it, but would be highly inequit-

able.” (Memorandum Decision, Tr. pp. 442 and 443.)

This finding is conclusive here.

Butte Copper Co. vs. Clark Montana Realty Co., 248 Fed. 609 (C. C. A. 9th Cir.);

Vandervort vs. Bishop, 199 Fed. 420 (C. C. A. 9th Cir.);

Thorndyke vs. Alaska Mining Co., 164 Fed. 657 (C. C. A. 9th Cir.);

Idaho Mining & Milling Co. vs. Davis, 123 Fed. 396 (C. C. A. 9th Cir.).

The original building project contemplated that the bank should transfer or procure to be transferred to the Building Company lots 10, 11 and 12 in block 1003, New Tacoma, free and clear of incumbrance, that the Building Company should execute a first mortgage thereon of \$600,000, which it was intended would be placed in the east, that it would be taken by the Metropolitan Life Insurance Company; that the Building Company should thereafter—within four months of February 10, 1920—execute a second mortgage upon the said premises securing a bond issue of \$750,000, and that \$350,000 of such bonds should be delivered to the bank as consideration for the three lots. (See Exhibits 181, Tr. p. 1005, and 184, Tr. p. 1020; testimony of Larson, Tr. p. 1084.) In furtherance of this scheme the bank procured conveyance to the Building Company of lot 10 from Drury the Tailor, and paid therefor \$65,000, and itself conveyed by

full warranty deed the other two lots. The intention of the bank to pay and discharge the \$70,000 Penn Mutual mortgage then existing as evidenced by the warranty deed, persisted as late as September, 1920, as witness Larson's taking a check east with which to pay off this mortgage. (Tr. pp. 1047, Cf. Statement of Nov. 30, 1920, wherein appears "Mortgages Payable, \$70,000"; Exh. 349, Tr. p. 1238.) In other words the consideration for that \$350,000 of the second mortgage bonds was the bank's delivery to the Building Company of the three lots, free and clear of incumbrance, which in turn included the payment to Drury the Tailor and the discharge of the \$70,000 mortgage. It follows, therefore, that the intention to enforce the mortgage securing the \$350,000 bonds cannot legally or equitably exist along with the intent to enforce the \$70,000 mortgage. The right to the bonds depends upon the extinguishment of the mortgage. The deed by which the bank conveyed lots 11 and 12 was in form a statutory warranty deed, which imports a covenant that the premises are free and clear of all incumbrance. This covenant was breached the moment the deed was delivered, irrespective of the due date of the \$70,000 mortgage.

7 R. C. L. Covenants, sec. 79, p. 1164;

15 C. J. Covenants, secs. 63 & 109, pp. 1247
& 1271.

Yet when the Order, Exhibit 335, was sought by

the Commissioner or his Special Deputy, the idea was obviously to preserve the property and to protect the security underlying the second mortgage bonds, and the intention then unquestionably was to enforce that latter security. The foreclosure of that second mortgage was sought in the court below, and is sought here. (See appellant's brief, p. 157, et seq.) The intention to seek relief under the bond issue denies any intent to enforce the \$70,000 mortgage. The two cannot exist at the same time.

In the light of the avowed intention as to the purchase money mortgage, and the maxim that "equity treats as done that which ought to be done", the appellants are estopped to assert that the \$70,000 mortgage was not discharged. Under the original arrangement made under the warranty deed given, the bank ought to have discharged the Penn Mutual mortgage before becoming entitled to the bonds. It or its successor in interest, the Commissioner, has taken an assignment of this mortgage when a release ought to have been procured. In equity under the maxim referred to the lien of the \$70,000 mortgage has been extinguished.

At the risk of unnecessary repetition we assert that the original plan of this building scheme was that the Building Company should have these three lots subject to two mortgages,—the one for \$600,000, the second for \$750,000. The position of the Commissioner is that the property is subject not

only to these two mortgages, but to the \$70,000 Penn Mutual mortgage, and to a liability for the \$65,000 paid Drury the Tailor as well.

Moreover, as more fully developed by Mr. Holt, this is not a case calling for the searching out of the actual intent existing at the time of the transactions, but rather one where the Commissioner will be presumed to have intended the legal consequences of his act.

Obligation as to \$70,000 Mortgage

Will all due deference to counsel for the Bank Commissioner we respectfully assert that they confuse in their argument under this heading the bank's obligation to the original mortgagee and its obligations to the Building Company. We may concede that the bank in its dealings with the Penn Mutual Life Insurance Company was meticulously careful that no direct obligation should be imposed upon it to pay the mortgage. It held the lots subject to that mortgage, but scrupulously avoided, in outward show at least, any assumption thereof. But when the bank came to deal with the Building Company the situation changed. It conveyed lots 11 and 12 by a warranty deed, conforming to the statutory requirements of such deeds in the state of Washington. (See Exhibit 325, Tr. p. 1194.) The effect of such deed is defined by the Washington statute as follows:

“Warranty deeds for the conveyance of land

may be substantially in the following form:

“The grantor (here insert the name or names and place of residence) for and in consideration of (here insert consideration), in hand paid, convey and warrant to (here insert the grantee’s name or names) the following described real estate (here insert description), situate in the county of, State of Washington.

“Dated this day of, 18..
 (Seal)

“Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns, with covenants on the part of the grantor:

“1. That at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple in and to the premises therein described, and had good right and full power to convey the same;

“2. That the same were then free from all encumbrances; and

“3. That he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same; and such covenants shall be obligatory upon any grantor, his heirs and

personal representatives, as fully and with like effect as if written at full length in such deed." Remington 1922 Compiled Statutes, sec. 10552.

The covenants imported into this deed impose an obligation upon the bank to discharge the then existing Penn Mutual mortgage.

"Under the deed containing covenants of general warranty, after its delivery, it was the grantor's duty to pay the outstanding incumbrance. Until such incumbrance was paid or satisfied she was personally liable under her covenant of warranty. *Mickels vs. Townsend*, 18 N. Y. 575. She could not take an assignment of such outstanding incumbrance to herself without it operating as a discharge of such mortgage assigned, regardless of her intent in the matter. If she intended the assignment as such, it operated as a satisfaction of the mortgage, and, of course, if it was intended to be a satisfaction instead of an assignment, and the money was paid to the mortgagee to satisfy the mortgage, the same was thereby satisfied. See *Kelley vs. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Brown vs. Lapham*, 3 Cush. (Mass.) 551; *Putnam vs. Collamore*, 120 Mass. 454; *Frey vs. Vanderhoof*, 15 Wis. 397; *Shirk vs. Whitten*, 131 Ind. 455, 31 N. E. 87; *Caley vs. Morgan*, 114 Ind. 350; 16 N. E. 790; *Burnham vs. Dorr*, 72 Me. 198; *Clay vs. Banks*, 71 Ga. 363; *Butler vs. Seward*, 10 Allen (Mass.)

466; *Kneeland vs. Wood*, 138 Mass. 198; *Bank vs. Sloan*, 97 Iowa 183, 66 N. W. 91; *Bank vs. Burnes*, 87 Pa. 491; *Converse vs. Cook*, 8 Vt. 164; *Zimpleman vs. Veeder*, 98 Ill. 613; *Sandwich Co. vs. Zellmer*, 48 Minn. 408; *Yerkes vs. Hadley*, 5 Dak. 324, 40 N. W. 340, 2 L. R. A 363; *Clark vs. Baker*, 14 Cal. 633, 76 Am. Dec. 449."

Sommers vs. Wagner, 131 N. W. 797, at p. 799.

See also:

Smith vs. Hogue, 123 N. W. 827.

That obligation followed the bank's assets into the hands of the Commissioner and stood in the way of his enforcement of the Building Company's agreement to give the bonds. So he discharged this obligation to protect and preserve the assets in his own hands and to enable him to enforce them for the benefit of the bank's creditors and stockholders. Our respect for the acumen of the Deputy Bank Supervisor in charge of the liquidation of the Scandinavian American Bank of Tacoma and for his counsel impel the belief that the statement on page 77 of their brief is deliberate camouflage. They say:

"The Bank Commissioner was under the positive duty of administering the funds of the bank for the benefit of all creditors of the bank and was without right or authority to pay off this mortgage which would result to the benefit

of the creditors of the Building Company and to the detriment of the creditors of the bank."

The facts are that the Commissioner did not pay off this \$70,000 mortgage, intending or knowing that it would result to the benefit of the creditors of the Building Company, and to the detriment of the creditors of the bank. He was advised and believed that he held prior liens upon the Building Company property which the \$70,000 mortgage jeopardized, and he discharged that mortgage to preserve his own lien for the benefit of the bank's creditors. Because events have proven his belief as to the priority of his liens erroneous does not change the nature of his acts, the intent with which they were performed, nor the legal effect thereof. Even if he knew his incumbrances to be subordinate to those of the lien claimants it does not follow that his acts were not honestly intended and calculated to benefit the bank's creditors. The \$70,000 mortgage concededly was first. Everything saved thereon increased the salvage for the holders of the junior incumbrances. Wherever the Commissioner's liens ranked the amount saved on the \$70,000 mortgage was earned for them, unless the lien claims intervened and took all, but until the Commissioner's present brief was written he has always asserted that the property was worth at least \$450,000, more than ample to discharge all of the lien claims. His error, if any, was in placing too high a value upon the property.

On pages 83 and 84 of appellant's brief much is made of the bank's so-called equity in the lots and of the Building Company's default in re the second mortgage bonds. Contrary to counsel's assertions the bank's default ante-dated the Building Company's default, for the bank's covenant against incumbrances was as hereinbefore pointed out breached when their warranty deed was delivered.

But, passing that point, the so-called equity of the bank in these lots was subject to the liens. The bank agreed to wait until June 10, 1920, for its bonds, and before that time came knew that work had been done and materials furnished and more contracted for, which might and did give rise to liens superior to the lien of the purchase money mortgage, which was to have been. Drury was president of the Building Company and Chairman of the Board of Directors of the bank. Sheldon was secretary of the Building Company and a vice-president and director of the bank. Larson was active in all the affairs of the Building Company and the president and active head of the bank. These three men at least knew all that transpired with relation to the Building Company. As to the knowledge possessed by other directors of the bank, we refer generally to their testimony. (Tr. pp...)

On the other hand the liens of laborers and materialmen when perfected attach to the property as of the date of the commencement of the furnish-

ing of the labor and material, but also to all interests subsequently acquired and owned at the time when the lien is perfected.

“The lien attaches to whatever interest the owner had when the work was begun, and to another or greater interest whenever acquired before the lien is enforced.” 18 R. C. L. Mechanics Liens, sec. 12, p. 885.

Jarvis vs. State Bank, 22 Col. 309; 45 Pac. 505;

Salem vs. Lane, etc. Co., 189 Ill. 593; 60 N. E. 37.

On pages 86 to 88 certain authorities are cited, to which it is a sufficient answer to say that the Building Company neither took subject to nor assumed and agreed to pay the \$70,000 mortgage. It took an indefeasible estate in fee simple, free and clear of all incumbrances.

The \$600,000 Mortgage

Under this head it is asserted that the Building Company owed the bank on January 15, 1921, the sum of \$856,879.67. (See Appellant's Brief, p.110.) This amount is taken from the statement complied by Mr. Geiger, formerly an assistant cashier of the bank, and introduced in evidence as Exhibit 348. (Tr. p. 1235.) We shall discuss the several items making up that total in the order given in said Exhibit 348.

Item 1. "Stock \$200,000." This is the purchase price of the total issue of capital stock of the Scandinavian-American Building Company, which was entered on the bank's books as an outright purchase on June 25, 1921, the stock being thereafter listed under the assets of the bank and carried on its books under the heading of "Stocks and Bonds". (See Tr. pp. 1027, 1033, 1118, 1119, 1097, 1158 and 1159, Exhibits 190 and 234.) This stock passed to the Bank Commissioner when he took over the bank and was thereafter listed by him as one of the assets in his hands. (Tr. p. 1033.) The \$200,000. paid by the bank therefor was passed to the credit of the Building Company (see Exhibit 190, Tr. pp. 1034 and 1035), and in part used to retire the then existing notes of the Building Company. (See Exhibit 185, Tr. p. 1026, and Exhibit 188, Tr. pp. 1032, 1114 and 1167.)

Item 2. This represents a note of the Building Company dated December 9, 1920, not December 31, 1920, as indicated in Exhibit 344. (See Exhibit 185, Tr. p. 1026. It was passed to the credit of the Building Company and used to take up two notes previously given under date of November 8, 1920, for \$100,000 and \$50,000 respectively. (See Exhibits 185 and 188, Tr. pp. 1026 and 1032.) The balance was used to retire the then existing overdraft of the Building Company. This item, and item 4, following which is the overdraft which

accumulated between the giving of this note and the closing of the bank on January 15, 1921, represent the only advances made to the Building Company in the shape of loans. We shall have occasion hereafter to consider the date of the inception of these loans in relation to the time of taking the assignment of the \$600,000 mortgage, and the assertion of it as collateral.

Item 3. "Loan (check) \$9,133.25." This item is fully explained by Exhibit 188. (Tr. p. 1030.) In the language of that exhibit, "this note represents the carrying as real estate loan No. 233, the check No. 1190 of the Scandinavian-American Building Company, dated December 31, 1920, payable to the Scandinavian-American Bank, for \$9,133.25, signed by J. V. Sheldon, Sec'y, Treas.". As further appears upon said check the amount thereof was made up by calculations of interest upon the purchase price of the capital stock from June 25, 1920, to December 31, 1920, and interest upon the purchase price of the Drury lot from September 25, 1920, to December 31, 1920, and interest on \$350,000 designated as 'banking house investment' from an unnamed date, apparently December 1, 1920, to December 31, 1920. (See Exhibit 350, Tr. p. 1242.)

Significantly this check-note was entered upon the bank's books at the close of the year after a visit by the Bank Commissioner on December 15, 1920. (See Tr. p. 118.) And, even more signi-

ficantly, the bank's records as to the stock purchase transaction were in no way altered. It appears always all along as an outright purchase, never as a loan. In the light of what we have said before we will let the Drury lot purchase item and the banking house investment item speak for themselves. They cannot both stand, since the \$350,000 of bonds includes the \$65,000 paid for the Drury lot. As to the bonds, this procedure was no doubt taken by the bank for the purpose of showing upon its books the interest which they thought had been earned during the year 1920. They unquestionably needed to get on their books all the earnings they could, but as to the propriety of the course they followed in this particular instance, we refrain from commenting.

Item 4. This has been sufficiently commented on in connection with Item 2 above.

Item 5. "Banking house, \$350,000." In the confused records of the bank they continued down to as late a date as November 30, 1920, to list the property which they had previously deeded to the Building Company as among their assets. (See Exhibits 226, 227 and 349, Tr. pp. 1102, 1104 and 1238.) At the same time the Building Company was charged with interest on this item of \$350,000. from December 1, 1919. (See Exhibit 35, Tr. p. 1242.) So that here, while designating this item as "banking house investment" they obviously intended the \$350,000 of second mortgage bonds

which they were to receive from the Building Company as payment for the three lots upon which the new building was to be erected. Yet, strange to say, while this amount represented the consideration for the three lots, yet the \$65,000 paid for the Drury lot is separately listed as Item 6 of said Exhibit 348.

Item 6. "Acct. on Genl. Ledger (Drury lot) \$65,000." is a duplication in part of the preceding item. It should have been charged off because of what Mr. Larson designates as the water in the value at which lots 11 and 12 were carried by the bank prior to the conveyance thereof to the Building Company. (Tr. p. 1084.) Unfortunately the bank's financial condition did not permit of the charging off of any items, and so it continued to be carried on their books. It has no rightful existence independent of the \$350,000 of bonds, and those bonds were by the terms of the agreement under which the bank was to get them to have their own security in the shape of a second mortgage, which the Supervisor is here seeking to enforce independently.

The result is that when the bank closed on January 15, 1921, there were actual advances to the Building Company evidenced by one note for \$200,000 dated December 9, 1920, and an overdraft of \$32,746.42. These two amounts alone can be claimed to be secured by the \$600,000 mortgage. It remains to be seen how much of this in-

debtedness was existing when that mortgage was first asserted as collateral.

The assignment of the \$600,000 mortgage was procured on October 7, 1920, by Mr. Larson while in Chicago, because Mr. Simpson, the mortgagee named therein, was sick, and because Mr. Larson's attorney advised him to get it to avoid trouble in the event of Simpson's death. (Tr. p. 1048.) At the time of taking it there was no thought of using it as security, and there was no direction from the Board of Directors of the bank that the assignment be obtained for the security of the bank, or for any purpose at all. In fact, after Mr. Larson secured the assignment he attempted to use that mortgage as collateral for a temporary loan, pending the completion of the building and the time when the Metropolitan Life Insurance Company would be ready to take it over and advance the full amount thereof. Neither the bank nor the Building Company authorized "the collateralization of this mortgage". (Tr. pp. 1166 and 1167.) Such are the undisputed facts. They clearly negative any intent to procure the assignment of this mortgage for the purpose of securing the bank. This mortgage was first asserted as security by the bank on December 9, 1920. On that day a memorandum note, without any signature of any officer of the Building Company and constituting Item No. 2 of Exhibit 384, was put through the bank's records by Mr. Morse, the note teller. It

was not considered by him as a note, simply as a memorandum, but the amount thereof was passed to the credit of the Building Company, and that Company's previous notes of \$100,000 and \$50,000 were taken up from the proceeds of such credit. (See Tr. p. 1219.) The evidence is not precise, but it fairly appears that there was at this time an overdraft in the account of the Building Company of approximately \$43,000.00 (Tr. p. 1186), to which should be added the interest upon the two notes taken up by the credit derived from this \$200,000 memorandum note, which amounted to \$774.99; (see Exhibit 188, Tr. p. 1032) so that the net advance of new money made on the 9th of December, 1920, approximates less than \$7,000.00.

Insofar then as this \$600,000 mortgage was attempted to be asserted as collateral it was as collateral for an entirely pre-existing indebtedness, except possibly to the extent of \$7,000.00. So far as it was collateral for a pre-existing indebtedness it was wholly void under the constitution of the state of Washington, and the construction placed thereon by the Supreme Court of that state and this court. See *Chavelle vs. Washington Trust Co.*, 226 Fed. 400, appeal dsmsd. 63 L. Ed. 414; *In re Progressive Wall Paper Co.*, 229 Fed. 494.

Supervisor is Estopped to Assert Priority for This Mortgage

The bank would be estopped to claim any priority for this mortgage, assuming it has

any validity in the hands of the bank, by reason of the representations made by the officers and agents of the bank to the various lien claimants that this particular mortgage was to provide completion money and would not be used for other purposes. These representations were made by Mr. Drury, chairman of the board of directors of the bank, and in part by Mr. Larson, president of the bank, and even though made in due course of the business of the Building Company are nevertheless binding upon the bank under the authorities cited by counsel for the Tacoma Millwork Supply Company. More particularly is this true if this court shall hold that both the Building Company and the bank are in effect one corporation under the authorities cited by Judge Stiles.

“Where the agent of the mortgagee in a mortgage given for future advances, informed contractors that he had the money in his possession to pay for the work and that they would be paid, the mortgagee is estopped to assert a lien prior to the contractor’s mechanics liens, and it is bound by the representations of its agent disbursing the money.”

Schweitzer vs. Equitable Sav. & L. Assn.,
98 Wash. 139; ... Pac. ...;

Bell vs. Swalwell Land Co., 20 Wash. 602;
56 Pac. 401;

Milwaukee Structural Steel Co. vs. Borun,
159 N. W. 811.

The Bank Supervisor or Commissioner is in this regard in the exact situation of the bank. He has no different rights, and the parties he represents have no superior equities over the lien claimants.

The \$600,000 Mortgage is Inferior to the Lien Claims Because There Was No Delivery and Acceptance Thereof Until After the Lien Claims Had Attached

The advances made by the bank were voluntary, not the result of any duty or obligation imposed by contract or otherwise, and so far as they were claimed by the bank to be secured by this mortgage were all made subsequent to the time when the liens had attached, and made with knowledge on the part of the bank officers that such liens had attached. The mortgage in the hands of the bank, and therefore in the hands of the Bank Commissioner, if security at all for the advances made by the bank or any of them, is inferior to the several liens. See *Schaefer vs. Reilly*, 50 N. Y. 61; *Hewson vs. Herzog*, 54 N. W. 751; *Finlayson vs. Crooks*, 49 N. W. 398; 27 Cyc 239, 240; *Melon vs. St. Louis Union Tr. Co.*, 225 Fed. 693.

In this connection we call the court's attention to *Andersonian Inv. Co. vs. Jones*, 104 Wash. 142, holding:

“Under Remington's Code (section 1132) giving preference to mechanics liens over any

mortgage which may attach subsequently to the time of the commencement of the labor, an architect's lien upon a building is superior to a mortgage for future advances, where the mortgagee had previous notice that the architect had already commenced to perform labor upon the plans and specifications and would continue as architect and superintendent of construction."

Under the doctrine of *Lipscomb vs. Exchange Nat'l Bank*, the lien of the architect is not established unless the plans and specifications which he prepares are actually used for the construction building. Consequently the notice in the Andersonian Company case which was sufficient to postpone the mortgage was notice merely of an inchoate right to a lien, notice of the performance of preliminary acts which if followed up under the contract there existing, would give right to a lien. In this case the bank and the Bank Commissioner are charged with the same notice so far as the lien claim of the complainant is concerned. The bank had notice prior to the execution of the Simpson mortgage and prior to its recording of the McClintic-Marshall Company contract, and of the fact that the McClintic-Marshall Company had commenced work thereon. The work which it had thus commenced was the beginning of the furnishing of the material which is the foundation of the complainant's claim for a lien herein. Further it is not

disputed that actual delivery of materials to the building premises had been made both by the McClintic-Marshall Company and the other lien claimants long prior to the assignment of the Simpson mortgage.

Moreover Simpson, the mortgagee named in the mortgage, was a broker whose services had been elicited by the bank or the Building Company to procure the placing of this mortgage because of work of the same character successfully completed by him in Seattle shortly before. It was not contemplated that he would advance a dollar on the mortgage. Neither was he, at the time that the mortgage was made, the trustee of said mortgage for any particular person, firm or corporation. The mortgage and note were made to him for convenience while he was the agent of the bank and the Building Company, and to all intents and purposes they must be treated and have the same effect as though the note and mortgage were made to the Building Company itself. They did not become effective or a completed transaction until they were delivered and accepted by a third party, who was to advance the money thereon.

“An indispensable requisite to the operation of a mortgage is delivery. To constitute delivery the mortgage must pass under the power of the mortgagee or some person for his use with the consent of the mortgagor, the

intent of the latter that there should be a delivery being the decisive factor * * * Not only must the mortgage be delivered by the mortgagor, but it must be accepted by the mortgagee, and until accepted it can have no effect as a lien. Thus where a mortgage is delivered for the use of the mortgagee but without his knowledge to the recorder to be recorded it must be held subordinate to attachments levied subsequent to the delivery but prior to acceptance by the mortgagee, his acceptance not relating back to the original delivery."

19 R. C. L. Mortgages, sec. 52.

Parmelee vs. Simpson, 18 Law. Ed. 542; 72 U. S. 81.

The facts are parallel to the present case. The opinion says:

"The placing of the deed on record was Bovey's (the grantor) own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed and delivery of it to the register for that purpose does not vest title in the grantee. (Citing cases.)

"If Simpson had agreed to accept the deed in liquidation of his debt and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him. But it

is said that he could ratify the acts of Bovey and the register. This is true, but he did not do this until after the execution and registration of the mortgage; and this ratification cannot relate back so as to cut out the mortgage. Simpson acquired no title until after the rights of the mortgagee had accrued, and he holds it encumbered with the lien of the mortgage."

Rogers vs. Head's Iron Factory, 70 N. W. 532; 37 LRA 429 Neb.).

The case involves a chattel mortgage, but otherwise is parallel to the instant case. The syllabus is as follows:

"A chattel mortgage delivered by the mortgagor unconditionally to an unauthorized third person, by whom, under the direction of the mortgagor, it was filed for record, and subsequently accepted by the mortgagee, takes effect, as between the mortgagor and mortgagee, from the time of the first delivery, but not so as to persons who have acquired title to an interest in, or a lien upon, the property before the actual acceptance by the mortgagee."

See also opinion, 37 L R A pp. 433 and 434.

First National Bank vs. McCreery, 132 Pac. 718, affirmed on rehearing 134 Pac. 1180.

"The delivery and acceptance of the mortgage are essential to its validity. Without

these there is no mortgage, but only an attempt at one, or a proposition to make one. It is true, however, that although there may be no valid delivery of a mortgage at the time of its execution, a subsequent delivery will avail against those who have not in the meantime acquired rights to the property or interest in it. But it is otherwise as to a creditor of the mortgagor who has acquired an interest in the property during such time. 1 Jones on Chattel Mortgages (5th Ed.) sec. 104.

* * *

“(4) ‘Acceptance’ is defined by Mr. Anderson in his dictionary as follows: ‘A receiving—with approval, or conformably to the purpose of a tender or offer’. The mortgage was signed by Officer without the knowledge or consent of McPherson, the mortgagee, and when the latter refused to ratify the transaction there was no mortgage. As was said by Mr. Justice Thayer in *Shirley vs. Burch*, 16 Ore. 83, at page 92, 18 Pac. 351, at page 356 (8 Am. St. Rep. 273) in speaking of the essentials of a mortgage: ‘One person cannot make a contract with another without the knowledge and consent of the latter; it must be a mutual agreement between the contracting parties. A contract in form, with a person who is a stranger to it, stands upon the same footing as an assumed contract with a fictitious person. It would lack

the essential elements of a contract—the meeting of the minds of the parties.’

“(5) A delivery of a mortgage is not complete without an acceptance by the mortgagee, which is essential to make a mortgage a valid instrument. 6 Cyc. 1009. The fact that the mortgage was recorded does not constitute a delivery and acceptance where there was none in fact. It is admitted that the mortgage was recorded without the knowledge or consent of the mortgagee. The recording therefore would not amount to a delivery. Jones on Chattel Mortgages (5th Ed.) sec. 106, states the rule as follows: ‘The delivery of a mortgage to the recorder, or the filing it in the proper office by the mortgagor, is not in itself such a delivery as will operate to give the mortgagee any title under it, prior to his actual acceptance of the security.’ See also *Bogard vs. Barham*, 56 Or. 269, 277, 108 Pac. 214, 217.

“(6) Where a creditor once refuses to accept a mortgage, he cannot afterwards accept it without the debtor’s consent. 1 Jones on Mortgages, (6th Ed.) sec. 85. In other words, when the proposition to mortgage is rejected, the entire matter is dead and cannot be revived without a new proposition, a new agreement, a new meeting of the minds.” (132 Pac. p. 720.)

See also *Johnson vs. North Star Lbr. Co.*, 206 Fed. 624, (C. C. A. 9th Circuit) following *Parmelee vs. Simpson*, *supra*; *National State Bank vs. Morse*, 34 N. W. 803 (Iowa); *Cobb vs. Chase*, 6 N. W. 208 (Iowa); see also cases cited in 6 *Roses Notes*, pp. 153 to 155. *Hibbard vs. Smith*, 4 Pac. 473 Cal.).

We also call the court's attention on this point to the fact that the bank is not a holder for value of this mortgage. See *Connecticut Invest. Co. vs. Dimick*, 105 Wash. 265.

Accordingly we join with Mr. Holt and Judge Stiles in asserting that neither of the three mortgages is entitled to recognition in this proceeding and submit that the decree of the District Court with respect thereto should be in all things affirmed.

Respectfully submitted,

ELMER M. HAYDEN,

MAURICE A. LANGHORNE,

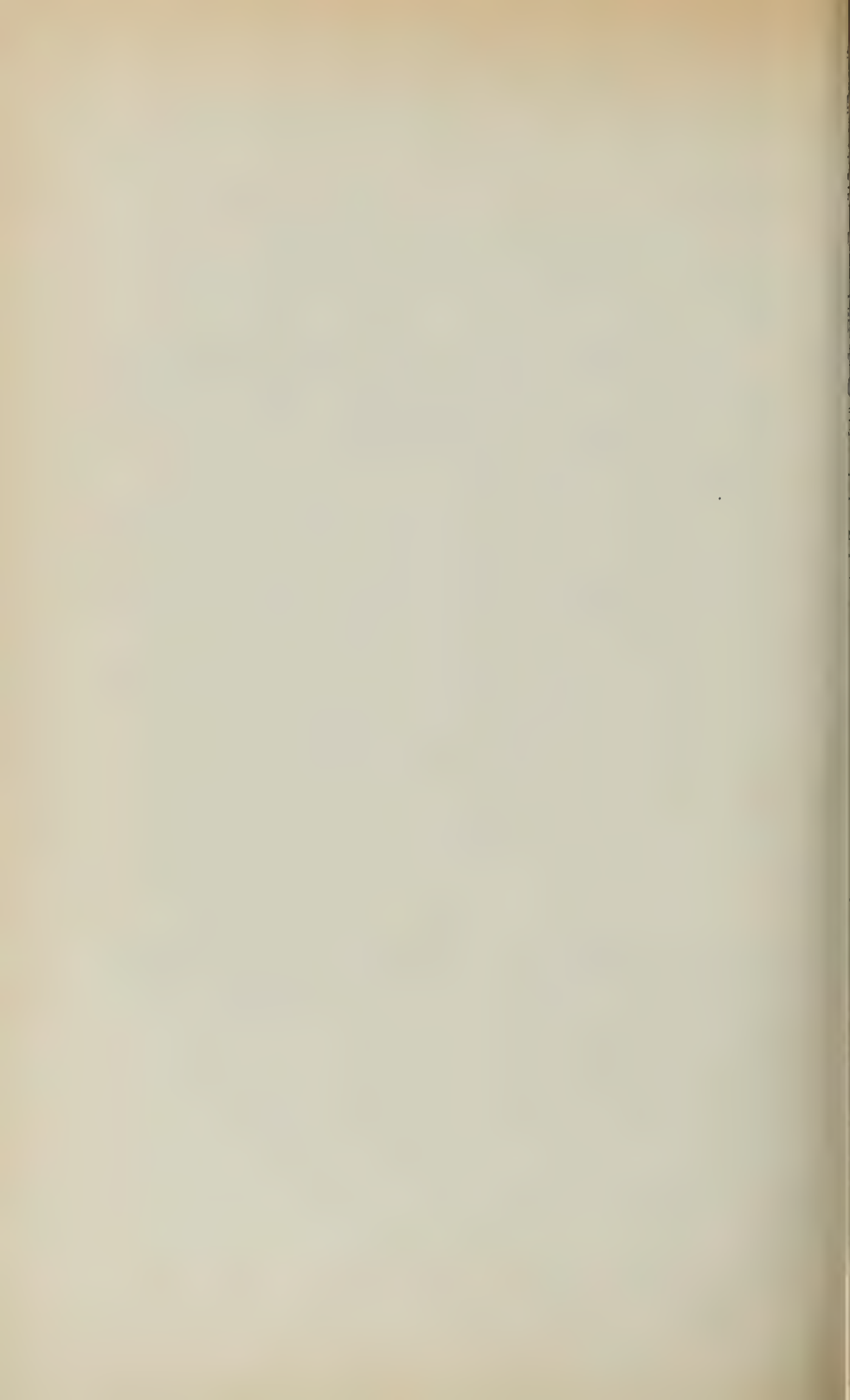
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United States Circuit Court of Appeals

For the Ninth Circuit

J. P. DUKE, as Supervisor of Banks of the
State of Washington, and as Successor in
Office of the Defendant CLAUDE P. HAY,
as State Bank Commissioner of the State of
Washington, FORBES P. HASKELL, JR.,
as special Deputy Supervisor of Banks of
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VIAN AMERICAN BANK OF TACOMA,
a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a
Corporation, FAR WEST CLAY CO. et al.,
Appellees.

No. 3953

Petition of Far West Clay Co. for a Re-Hearing.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTH-
ERN DIVISION.

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1115 Fidelity Building,
Tacoma, Washington.

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Corporation, FAR WEST CLAY CO. et al.,
Appellees.

No. 3953

Petition of Far West Clay Co. for a Re-Hearing.

PETITION FOR RE-HEARING.

The appellee Far West Clay Co. respectfully presents this petition for a re-hearing and requests the court to reconsider its decision with respect to the validity of the \$70,000 mortgage in the hands of the Bank Supervisor and his right to foreclose it.

We earnestly insist that an injustice has been done to the lienors by this decision and that they have the right to enforce their lien against the property freed from the mortgage in question.

The bank sold the property to the building company by a deed with a covenant of warranty against encumbrances. The \$70,000 mortgage was then a valid encumbrance on the property. The deed was recorded and thereupon the building company, representing that it was the owner of the property, induced appellees to furnish builders' materials to construct a building thereon. They relied partly on the title conferred by the deed.

The bank failed, and liens against the property having been filed by appellees and others, the Bank Supervisor, in charge of the liquidation of the bank, paid off this mortgage and now seeks to enforce it against the property conveyed by the bank, claiming that in his hands it is a valid and subsisting mortgage, prior to the liens that had attached after the conveyance of the property.

The opinion affirms the position of the Bank Supervisor and orders a foreclosure of the mortgage.

We respectfully submit that this opinion is erroneous. It was reached by a misunderstanding of our position and of the rules of law invoked by us. We took two positions with respect to this mortgage:

1. That the bank having assumed and agreed to pay it as part of the consideration for the property, if the Bank Supervisor was claiming a purchase money lien for the purchase price, which included the mortgage, he was in duty bound to pay the

mortgage. He not only claimed a lien for the amount of the purchase price, which included the amount of this mortgage, but he sought to enforce it in this action. Under such circumstances, when he purchased the mortgage it became satisfied, without regard to the question of his intent because it was his duty under such circumstances to pay and discharge it or, in any event—his paying it under such circumstances operated in law as a satisfaction of it. We still think that this position is sound and we urge a revision of the opinion on this question.

2. That the bank having conveyed the property by a warranty deed while it was encumbered by this mortgage, it could not thereafter have paid this mortgage and taken an assignment of it, nor could the Bank Supervisor do so; that a payment by either under such circumstances operated as a satisfaction and discharge of the mortgage; that a purchase of it inured to the benefit of the lienors whose liens had attached after the conveyance of the property.

The latter position is the one on which we most relied, because we thought, and still think, that this position is sustained by one of the best recognized and established rules of law. This position was outlined clearly enough in our brief at pages 13, 31, 32, 47, 53, 55, 59 and 72. On pages 46 and 47 of our brief are found the authorities sustaining the proposition. We quote the language of one of the well considered cases as follows:

“When one who has conveyed land with warranty, which is subject to a mortgage whether made by him or by another, afterwards takes an assignment of such mortgage, he holds for the benefit of the person to whom he has granted the land and the mortgage is in fact discharged by coming into his hands. Even if he should assign it to one who pays full consideration for it, the purchaser would acquire no lien upon the land. Jones on Mortgages, 867.”

Brosseau vs. Lowy, 70 N. E. 901.

The rule is stated by Mr. Pomeroy as follows:

“If a person, who has conveyed land with a covenant warranting against encumbrances, afterwards pays off or takes an assignment of the mortgage against the premises, the same becomes extinguished. He cannot keep it alive as a subsisting lien, for to do so would be a direct violation of his covenant.”

2 Pom. Eq. Jur. § 798.

The bank conveyed the property by warranty deed and the lienors, relying on it, furnished the builders' materials. For the bank or the Bank Supervisor to destroy the rights and equities of the lienors attaching under such circumstances, by an assertion of the mortgage against which it had covenanted, would be grossly unjust. The bank put the matter in that shape by its contract with the building company, and if the building company failed to pay for the land, this failure ought not

to give the bank or its Supervisor any rights superior to those of the lienors. The transaction may have been a foolish one on the part of the bank, but the lienors relied on the actions of the bank, and their equities, it seems to us, are superior to the equities of the bank. We think, however, that the question is not to be settled by a comparison or balancing of the equities of the respective parties, but rather by the fixed and immutable rule of law which prohibits the vendor from purchasing an encumbrance on the property in violation of his warranty against it.

This question, we believe, was not touched, considered or discussed by the court in its opinion. In this opinion the court said, "Briefly stated, the appellees contend that it was the duty of the bank to discharge and pay off this mortgage because of the warranty contained in its deed, and that when that duty was performed by the Bank Commissioner as the representative of the bank, the mortgage lien was extinguished and the mortgage satisfied."

The court then proceeds to point out that there was no legal duty on the part of the Bank Commissioner to discharge this mortgage and that in the absence of such a duty the payment by the Commissioner did not operate as a satisfaction of the mortgage.

The decision by Judge Shaw, referred to in the opinion of the court, is a correct statement of the law applicable to the question involved in that case,

but it has no real application to either of the two propositions on which we relied in this case. We did not contend that a legal duty to pay the mortgage arose by reason of the warranty, as the court suggests in its opinion. We did contend that this duty, as a matter of policy, existed by reason of the warranty—that it was the duty of the Supervisor to protect his estate from the damage arising from its breach; but this was not the legal duty referred to by Judge Shaw, nor was it the legal duty which the court in its opinion says we relied on in connection with the warranty.

The court confused our argument on this question with our argument on the proposition that a legal duty rested on the supervisor to pay the mortgage by reason of its being assumed by the bank and the further fact that at the time the supervisor purchased it he was claiming a lien for the purchase price which included the amount of the mortgage. This is the legal duty to discharge the mortgage, referred to in our brief, but it had no connection with the warranty. Perhaps the apparent necessity at times for us to discuss the two propositions together obscured our real position with respect to the effect of the warranty.

Our position with respect to the warranty was that if the mortgage had been paid by the bank it would have resulted in a satisfaction and it would have inured to the benefit of the building company and the lienor and that the situation of the Bank

Supervisor with respect to the subject was the same as that of the bank.

If the bank had paid the mortgage a satisfaction of it would have resulted without regard to the question of duty or intention. The same result followed the act of the Supervisor, but it was by virtue of the warranty and the rule we have stated with respect thereto. No question of duty or intention arose.

We contended and contend now that when the mortgage was paid by the Bank Supervisor it made no difference what his intention was; by reason of the warranty it became satisfied by virtue of the rule of law which is contained in the quotations from Jones on Mortgages and Pomeroy's Equity Jurisprudence, already set out in this petition. We are therefore justified in saying that the court has not passed on this question in the decision already rendered herein and we seek from the court a rehearing on it.

No blame can attach to the Bank Supervisor for purchasing the mortgage, because at the time, he held the \$600,000 mortgage and it may have appeared necessary for its protection that the other mortgage should be assigned to him or disposed of in some way. No legal liability could attach to the Bank Supervisor, or his agents, for purchasing the mortgage under the circumstances, even if it is held by the court to have been satisfied and discharged by his act. This is settled by all the authorities.

"General obedience to the order and direction of the court is sufficient protection to the receiver, although the order may be erroneous or subsequently reversed, and he will not be personally liable for losses sustained in administering an estate pursuant to such orders and direction and in the exercise of good faith and ordinary care and prudence."

34 Cyc. p. 294.

It was suggested by the court in its opinion, "that the Bank Commissioner for some purposes may represent the bank, but in a larger sense is a public officer charged with the duty of collecting the assets of insolvent banks and liquidating their debts."

We do not understand just what bearing this proposition has on the question we are presenting. We desire, however, to challenge its correctness, if it is sought to apply it to the manner in which the Bank Supervisor deals with the assets of the bank. There are a number of cases touching this question, directly or indirectly, and in none of them is to be found a line or a sentence justifying this attitude of the court. On the contrary they all affirm the position that, except as to those matters connected with the administration of the insolvent estate which are controlled by express provisions of the statutes, the Bank Supervisor occupies the position and the relation, to all parties, of a receiver in equity.

The Supreme Court of this state recognizes this as the position of the Bank Supervisor and, in a case

which involved the measure of the rights of a bank supervisor under our statutes, they referred to them as being the rights of a receiver. The court, in speaking of the rights of the Bank Supervisor, said, "The general rule is that the receiver takes the property of which he has been appointed in the same plight and condition and subject to the same equities and liens as he finds in the hands of the person or corporation or of whose possession it is taken", and we should regard this decision as a statement of the attitude of the Bank Supervisor under the law of this state and it should be binding on this court.

Moore vs. American Sav. Bank & Tr. Co.,
111 Wash. 148.

We desire to refer the court to pages 53 and 55 of the brief filed by us in this case for a presentation of this question.

The Bank Supervisor, under the laws of this state, is charged with the performance of certain duties, of a public character, with reference to the control and supervision of banks. These, in a sense, are governmental functions. The legislature, however, saw fit to extend his duties. Perhaps it was wise to have him wind up the business of insolvent banks instead of leaving it to a receiver appointed by some court. This duty, however, can hardly be called a governmental function. The general public has no interest in it. It is a matter affecting only those whose private interests are involved.

Suppose, however, that the assumption by the court in its opinion is correct and that a bank supervisor, in a broad sense, is a public officer.

Does it follow that in the administration of the affairs of the bank he is not controlled by the rules of law regulating the rights and duties of the respective parties, as defined by the express law of the land? In the absence of any provision in the law which creates him, limiting or defining his duties or powers, are they not to be determined by reference to the general law on the subject?

That certain duties, usually performed by a receiver, are, for convenience or policy, vested in one who also performs governmental functions, to the subject of which these duties are more or less related, surely does not bring the discharge of them within the definition of governmental functions, so that the policy or sovereignty of the state supplants or controls the private rights of the parties. A decision which removes the administration of the assets of an insolvent bank from the general laws regulating the rights of the parties and their private affairs, and transfers it to the realm of public policy and government control, with a consequent modification of these rights, is clearly not justified unless the express provisions of the law require it. Our statutes contain no such ideas or provisions. Such a decision under the existing circumstances will create confusion and will do harm. It is dangerous, if not revolutionary, in its tendency to in-

ject the government into the private affairs of the people. We have too much of that already.

The assets of an insolvent bank in this state, under the banking laws, are to be administered in accordance with the private rights of the parties interested, and these rights are defined by private law and not by the canons or rules of public policy.

In the case of *People's State Bank of Lakota vs. Francis et al.*, 79 N. W. 853, it is said,

"The fact is the receiver of a national bank is neither an indorsee nor an assignee for value. He is simply an agent and officer of the United States. *Ex parte Chetwood*, 165 U. S. 456, 17 Sup. Ct. 385, and cases cited. The government places him in charge of one of its financial agencies for the purpose of closing it up and terminating such agency, and in so doing he simply acts in lieu of the officers of the bank. He replaces them, stands in exactly their shoes, so far as the assets are concerned, and their knowledge necessarily becomes his knowledge."

In *Ward vs. Oklahoma State Bank of Atoka*, 151 Pac. 852, it is said:

"In this situation of the law, it seems to us that the position of the bank commissioner in taking charge and collecting the assets of a failed bank is quite analogous to that of a receiver or trustee in bankruptcy, or of an assignee for the benefit of creditors."

In the case of *Scott vs. Armstrong*, 146 U. S. 499, 36 L. Ed., it is said:

“The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of a statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached.”

We call the attention of the court to the cases referred to on pages 82 to 86 of our brief in this case. In no case which we have examined is to be found a suggestion that in the administration of the assets of an insolvent bank the Bank Supervisor can apply or employ any higher law than that which regulates the private rights of the parties.

We must conclude that the status of the Bank Supervisor is the same as that of a receiver, and we refer the court to the cases and argument on pages 65 *et seq.* of our brief in the case.

In its opinion, on page 9, the court does not speak tolerantly of the claims of the lienors to a preference over the mortgage and seems to attach much importance to the supposed superior equities of the depositors. The equities of the depositors, if they are to be considered in this case, are inferior to the equities of those who dealt with the property by reason of the contracts of the bank. The depositors give their money to the bank to be used in its business. It is their act that enables the bank to wrong

others by breaches of its contracts. There is a rule that he who puts it in the power of another to act should not complain. The analogies of the law recognize no superior equities in the depositors. In some states they are specially protected, but not in Washington. We doubt the fairness of the law giving them special protection. It was the acts of the bank, in a sense the agent of the depositors, that induced the lienors to furnish their materials. The warranty of the title and the express promise of the bank to pay the mortgage, and the representations of the bank, all united to produce the result, and yet for a legal conception of the rights of the parties is substituted a sentimental consideration—the supposed equities of the depositors! It is suggested that the Bank Supervisor would have had no right to pay off the mortgage under the order of the court. I ask, why not? It was bought, as shown by the petition and order, to protect the \$600,000 mortgage. If it had been satisfied the protection would have been just the same, but for the misfortune, not then anticipated, that overtook the latter mortgage.

In its opinion, the court suggests that the lienors are too grasping when they claim the benefit of the money actually invested in the building and then deny the right of the Supervisor to hold the \$70,000 mortgage as a prior lien. It is suggested by the court, in every vigorous language, that the equities

mortgage it became satisfied or inured to the benefits of the building company and the lienors.

Respectfully submitted,

R. S. HOLT,

Attorney for Far West Clay Co.

The undersigned attorney for Far West Clay Co. does hereby certify that he has read the foregoing Petition for Rehearing and that in his judgment the same is well founded and that it is not interposed for delay.

R. S. HOLT.

No. 3953

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FORBES P. HASKEL, Jr., as Receiver of SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation, et al.,

Appellant,

VS.

McCLINTIC-MARSHALL COMPANY,
a Corporation, et al.,

Appellees.

**Petition for Re Hearing
of McClintic-Marshall Company**

ELMER M. HAYDEN,
MAURICE A. LANGHORNE,
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Company, Appellee.*

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GORDON & SMITH,
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Filed this of May, 1923.

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.

No. 3953

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Appellees.

Petition for Re Hearing of McClintic-Marshall Company

The McClintic-Marshall Company, one of the appellants in the joint appeal prosecuted by E. E. Davis & Co., Far West Clay Company, and itself, and an appellee in respect to each of the other appeals involved in this proceeding, respectfully petitions this court for a rehearing of this cause upon two of the questions involved, namely: the rank of the lien to be awarded to the Tacoma Millwork Supply Company; second, the right of Tacoma Millwork Supply Company and Washington Brick Lime & Sewer Pipe Company to any lien at all.

Rank of Lien of Tacoma Millwork Supply Co.

We, and all parties interested in this cause, sincerely appreciate the expedition with which the opinion was rendered, but, nevertheless, feel that this point was overlooked. It was squarely raised as a ground for reversal by Assignment of Error No. III on the appeal taken jointly by E. E. Davis & Co., Far West Clay Company and McClintic-Marshall Company. It was argued both in the brief filed by those appellants (see pp. 16 and 30 to 31 of their brief) and in the brief filed by McClintic-Marshall Company in connection with the appeal of the Tacoma Millwork Supply Company. (See pp. 58 and 59 of its brief). It was orally argued by the writer hereof. It is not referred to in the opinion filed, notwithstanding this statement:

“Some of the grounds urged for reversal are
“common to more than one of the parties, but
“all are believed to be included in the following
“statement.”

The all embracing language used by the writer of the opinion and the comprehensiveness of his statement of the several grounds urged for reversal, as well as the summary disposition of such claims as were found to be without merit, impel the conclusion that the present point was lost in the general mass rather than disregarded as unworthy of notice. With that conviction we present that branch of this petition.

In a contest for priority such as this the rank to be assigned any claim comes next in importance to the establishment of the claim itself. Yet the opinion rendered, while awarding the Tacoma Mill-work Supply Company a lien, leaves the determination of the rank of such lien to inference. We therefore pray a rehearing or a supplemental opinion to fix definitely that rank. The case should not be remanded with any ambiguity inhering in it if such ambiguity can be resolved here.

Under the Washington Mechanics' Lien Law a contractor's or sub-contractor's lien is inferior to to those of laborers, and materialmen.

"In every case in which different liens are
 "claimed against the same property the court
 "in the judgment must declare the rank of such
 "lien or class of liens which shall be in the fol-
 "lowing order:— 1. All persons performing
 "labor; 2. All persons furnishing material;
 "3. The sub-contractor; 4. The original con-
 "tractor. And the proceeds of the sale of the
 "property must be applied to each lien or class
 "of lien in the order of its rank; * * *".
 (Remington's 1915 Code, Sec. 1141).

A contractor or sub-contractor undertaking to furnish the material and perform the labor requisite for the accomplishment of a certain portion of the building program cannot have separate liens, first, for the labor performed, and second, for the ma-

terials furnished. He has a lien according to his contract and its rank is thereby determined. This follows from the Washington statute and the construction placed thereon by the Supreme Court of the State.

“The contractor shall be entitled to recover
 “upon the claim filed by him only such amount
 “as may be due him according to the terms of
 “his contract after deducting all claims of
 “other parties for labor performed and materi-
 “als furnished; * * *”. (Remington’s Code,
 Sec. 1139.)

The entire lien law of this state was construed by the Supreme Court of the state with reference particularly to the nature and rank of contractors’ and sub-contractors’ liens in *Chavelle vs. Island Gun Club*, 77 Wash. 304, 137 Pac. 5. We crave the particular attention of this court to Judge Ellis’s opinion in that case. That opinion is too long to be quoted in its entirety but after setting out Section 1129 of the Code, which is the initial section awarding a lien to laborers and materialmen, and the portions of sections 1139 and 1141 above quoted, proceeds as follows:

“A reading of these sections, and an applica-
 “tion of the liberal rule of construction pre-
 “scribed by the section last quoted, induces the
 “view that it was the intention of the law
 “makers to provide a lien for every person

“furnishing materials going directly into the
 “given structure or performing labor directly
 “upon it. The provision first quoted (Sec. 1129)
 “accords a lien to every person performing labor
 “or furnishing materials, and Section 1141 clas-
 “sifies all persons doing either, and prescribes
 “the rank of their liens. Section 1139, taken
 “in connection with Section 1141, must be con-
 “strued as using the word ‘contractor’ in its
 “generic sense, and including both the principal
 “contractor and subcontractors, else there
 “would be no lien for a subcontractor as such
 “and no lien whatever for a subcontractor ex-
 “cept as he might also be a laborer or a materi-
 “alman. *The latter cannot be the intention,*
 “*because, in Section 1141, the subcontractor’s*
 “*lien is subordinated to that of laborers and*
 “*materialmen, which would be wholly sense-*
 “*less unless there were a distinction between*
 “*the lien of a subcontractor and that of a*
 “*laborer or materialman.*

“Construing these three sections together
 “and giving a meaning to each, it is clear that
 “a subcontractor as such is entitled to a lien
 “for labor or materials or both, furnished and
 “paid for by him in the performance of some
 “specific part of the work under contract with
 “the principal contractor, as distinguished from
 “the lien prescribed for laborers and material-
 “men as such. The recovery on a subcontract-
 “or’s lien is, therefore, like that of any other

“contractor given under Section 1139 ‘accord-
 “ing to his contract;’ otherwise it has no in-
 “dependent existence, though expressly sub-
 “ordinated to, and hence distinguished from,
 “the liens of laborers and materialmen under
 “Section 1141. It follows that the only sensible
 “distinction between the lien accorded to the
 “principal contractor and the subcontractor is
 “found in the fact that, in marshaling liens,
 “the latter ranks the former and receives a
 “preference in the distribution of the pro-
 “ceeds of the sale of property subject to the
 “liens on foreclosure, just as the latter is sub-
 “ordinated to the liens of laborers and materi-
 “almen as such.

“There is, and can be, no distinction as to
 “the character of the items going to make up
 “the lien claim of the principal contractor
 “and that of a subcontractor without destroy-
 “ing the lien of the latter as a distinct lien.
 “Each is entitled to recover upon his lien claim
 “the amount due according to his contract,
 “‘after deducting all claims of other parties
 “for labor performed or materials furnished.’ *
 “* * ” (Op. 77 Wash. pp. 307-308.)

If, then the Tacoma Millwork Supply Company was, with respect to all or any part of the work undertaken by it for the Scandinavian-American Building Company, in the position of a contractor or subcontractor, as distinguished from a material-

man, the lien to be awarded it, if any, must, as to the portion as to which it is deemed to be a contractor, be ranked in the judgment as inferior to the liens of laborers and materialmen.

It is and has been our contention, though unnoticed or disregarded, that this claimant was, as to all of its work, in the position of a contractor and that any lien which it might be awarded was, therefore, subordinate to the lien of McClintic-Marshall Company as a materialman and to all other liens of materialmen and laborers. The facts are that the Tacoma Millwork Supply Company undertook as one transaction to furnish and install the interior millwork for this building. It is true that certain divisions of this work were embodied in separately executed documents, but that they in point of fact constituted one transaction and one contract seems an inevitable conclusion from the following undisputed facts. The several documents were executed simultaneously as one transaction. (See Exhibits 151-, 152 and 153; Tr. pp. 746, 758 and 763, and paragraph XII of the original answer and cross complaint and as repeated in the amended answer; Tr. pp. 171 and 218.) The claimants themselves so allege the transaction.

“That the contract, Exhibit “C”, being a
“contract for the erection of the two several
“characters of millwork hereinbefore referred
“to as being manufactured under Exhibits ‘A’
“and ‘B’ attached hereto and made part here-

“of, was entered into contemporaneously with
 “the said other or remaining contracts by
 “these, your cross complainants, and formed
 “and is a part of the consideration entering
 “into the two remaining contracts, and was
 “all one and the same transaction, each con-
 “tract being a consideration for the entry
 “into the other.”

(See paragraph XVI of Tacoma Millwork Supply Company's answer and cross complaint; Tr. pp. 173 and 221). They so describe it in their testimony (See Tr. p. 701). The language of the contracts themselves shows their correlation. Thus, in Exhibit 151, which is referred to as the material contract, it is provided “all the work aforementioned to be delivered and *put in place*.” (See Tr. p. 749, italics ours). The italicized requirement of the contract obviously would be improper and out of place in a contract which contemplated only the furnishing of the material. And again in the banking quarters contract, Exhibit 152, there is this provision as to payment:

“And the balance of 25% to be paid within
 “30 to 60 days from the completion and ac-
 “ceptance of the mill work and erection covered
 “by this contract.” (See Tr. p. 764).

So the execution of the work embraced in these separate documents was commingled. Part of the labor called for by the so-called erection contract

was done, not at the building but in conjunction with the finishing of the material in preparation for and prior to any delivery or tender of delivery of it under the so-called material contract. (See Tr. pp. 674 and 688). The lien claim upon which the Tacoma Millwork Supply Company relies combines all work and treats the matter as one transaction. (See Exhibit 174; Tr. 785 to 787). In fine, the lien claimants, both during the execution of the work which they had contracted to do and in seeking relief thereon, have construed these several documents as constituting a single transaction and one general contract for the furnishing and erection of the interior mill work.

Furthermore, these claimants admit that as to the so-called banking quarters contract are contractors. (See Tacoma Millwork Supply Company brief, p 97). Part of the material, which has been completed and actually delivered, though not installed, is material called for by this division or branch of the general contract. It amounts to \$1957. (See Exhibit C-1 to Exhibit 154; Tr. p. 770). In the face of the statute, Remington's 1915 Code, Sections 1139 and 1141, and of the construction placed thereon by the Washington Supreme Court, and against their own admissions, is this so-called bank quarters contract to be split or segregated and a materialman's lien, as distinguished from a contractor's lien, allowed them for the material called for by this contract which was com-

pletely manufactured and ready for delivery on January 15, 1921? There can be but one answer.

“Each lien shall stand upon its own footing”

Huttig Bros. Mfg. Co. vs. Denny Hotel Co., 6 Wash. 122 at p. 128.

If we have reached the correct conclusion—that the Tacoma Millwork Supply Company must be treated as having but one contract—then it follows inevitably that any lien which they may be awarded must be ranked as as contractor’s lien. We therefore respectfully ask the court if it adheres to the position announced as to awarding that claimant a lien, to file a supplemental opinion adjudging, in accordance with the requirements of the statute, the rank of such lien and in so doing to adjudge that rank as that of a contractor, subordinate and inferior to the liens of laborers and materialmen.

II.

Right of Tacoma Millwork Supply Company and Washington Brick Lime & Sewer Pipe Company to any lien at all.

The opinion rendered on this point starts with the hypothesis that “the exact point here presented has never been determined by the Supreme Court of the State.” Its argument proceeds:

“This case differs, therefore, in two important respects from any of the cases de-

“cided in the Supreme Court. First, there
 “was here no intervention of contractor or
 “subcontractor and second, the material was
 “prepared especially for the building and is
 “of little or no value for any other purpose.
 “Under such circumstances, that is, where
 “the material man contracts directly with the
 “owner and where the material is manufac-
 “tured and especially designed for the building,
 “the material is furnished in contemplation of
 “law as soon as prepared and ready for de-
 “livery * * *.”

We admit the difference in the first respect, though we deny that it is sufficient to justify a holding contrary to those of the Supreme Court of the State.

With respect to the second point of difference we respectfully submit that it is not well taken. *Huttig Bros. Manufacturing Company vs. Denny Hotel Company*, 6 Wash. 122, involved precisely such a claim as that of the Tacoma Millwork Supply Company and one similar in all respects to that of the Washington Brick Lime & Sewer Pipe Company. Of that claim it is said in the opinion:

“It is conceded that said materials were all
 “furnished under a contract between said res-
 “pondent and said contractor and that the same
 “were specially designed and made for said
 “building and are necessary to the completion
 “of the building;” (See 6 Wash. p. 124).

The decision in that case still stands as authority in the state of Washington without modification or impairment. It is therefore important to notice with some particularity the precise points covered by that decision. There the lien claimant, Huttig Bros. Manufacturing Company, having made a contract with the general contractor for the fabrication of the interior mill work according to special design, filed two claims of lien, the first being filed after these specially designed and manufactured materials had been completed and shipped, the second after such materials had arrived at Seattle and had been delivered to the hotel premises. It was held squarely that the first lien claim was prematurely filed for the reason that the materials had not been furnished so as to give rise to a claim of lien until they had been delivered to the premises. The fact that they were completely manufactured and ready for delivery and had been delivered to a common carrier was not enough.

We quote the pertinent portions of the opinion so holding:

“It is contended that the materials have not
“all been furnished when the claim of lien was
“filed and that a party can have no lien for
“materials which have not been furnished at
“or prior to the filing of the lien notice. It
“appears that two lien notices were filed, one
“on March 7, 1891, which was ruled out by
“the court at the trial on the ground that it

“was prematurely filed; but a subsequent notice
 “filed May 13, 1891, after the delivery of all
 “the materials, was admitted. The last portion
 “of the materials had been shipped and were on
 “their way here when the first notice was filed
 “but had not yet arrived. If, in consequence
 “of this, the first notice was prematurely filed,
 “it would not deprive the respondent of the
 “right to file another notice after all the ma-
 “terials had been delivered* * *

“Appellant contends that it commenced to
 “furnish materials from the time that it be-
 “gan to prepare the same for shipment in the
 “State of Iowa and in consequence of its hav-
 “ing commenced the preparation thereof be-
 “fore the execution of the mortgage its lien
 “is superior to the mortgage lien. But the
 “lien can hardly date from the time appellant
 “commenced the preparation of materials in
 “another state. It was to furnish the materials
 “delivered at the building in the city of Seattle
 “and its claim cannot be held to have attached
 before the delivery thereof. *Williams vs.*
Chapman, 17 Ill. 423”. (See Wash. op. at pp.
 125 and 130.)

Therefore, unless the fact that in the Denny Hotel Case the materialman contracted with the general building contractor, while here the Tacoma Mill-work Supply Company and the Washington Brick Lime & Sewer Pipe Company contracted directly

with the owner, marks a real distinction in principle, this early holding of the Supreme Court of the State of Washington, which is the leading case in the state upon the subject, is directly contrary to the present holding of this court that material especially manufactured and designed for a building "is furnished, in contemplation of law, as soon as prepared and ready for delivery." In the same way that holding is contrary to the decisions in *Congdon vs. Kendall*, 73 N. W. 659, and *McEwen vs. Montana Pulp & Paper Co.* 90 Pac. 359, cited as supporting authority in the opinion filed.

The proposition thus resolves itself down to the narrow question, does the interposition of a general contractor between the owner and the materialman change the definition of or the construction to be placed upon the word "furnish" as used in the Washington Lien Statute?

The right of lien is purely statutory. The statute makes no distinction between a furnishing at the instance of the owner and one at the instance of the contractor. On the contrary it puts both instances on the same footing since it makes the contractor the agent of the owner. The material portions of the statute upon which the right to a lien must ultimately rest are as follows:

"Every person * * * furnishing material to
 "be used in the construction, alteration or repair
 of any * * * building * * * or any other struc-

“ture * * * has a lien upon the same for the
 “* * * material furnished by each respectively,
 “whether performed or furnished at the in-
 “stance of the owner of the property subject
 “to the lien or his agent; and every contractor,
 “subcontractor, architect, builder or person
 “having charge of the construction, alteration
 “or repair of any property subject to the lien
 “as aforesaid, shall be held to be the agent of
 “the owner for the purposes of the establish-
 “ment of the lien created by this chapter: * *
 “* * *” (Remington’s 1915 Code, Sec. 1129)

In passing upon a claim of lien for materials under this statute the Supreme Court in *Fuller & Co. vs. Ryan*, 44 Wash 385, in an opinion in which Judge Rudkin concurred, said:

“If the materials were not used in the build-
 “ing, nor taken to the premises, we do not
 “think it could be said that they were pur-
 “chased to be used in such building, within
 “the meaning of the statute. The reason for
 “allowing a lien to secure the purchase price
 “of building material would seem to be absent
 “where such material was neither used in the
 “building nor taken to the premises for that
 “purpose; and it would be difficult to see why
 “the vendor of such material would have any
 “better right to a lien than would the seller
 “of any other species of personal property.
 “Doubtless, the actuating thought of the legis-

“lature was that the materialman should retain a purchase-price lien upon the thing itself; and this could be accomplished only by allowing a lien upon the building and the premises into which, or upon which said material should become builded or delivered. To hold the right of lien further extended could only be done under a statute clearly evidencing such an intention on the part of the legislature. We deem our statute incapable of such a construction.”

Adapting the reasoning of that decision to the point under consideration, we assert that a definition or construction of the term “furnishing” as used in the statute differing according to who ordered the materials, can only be justified if the statute “clearly evidenced such intention on the part of the legislature”. It is not suggested that the legislature has ever in any way evidenced or intimated any intention to make such a distinction.

The reasoning of the opinion filed is that the owner of the premises liened upon could accept delivery of material at a warehouse distant from the premises involved and that under such circumstances the validity of the lien claim could not be questioned. If so, a corporate owner could so accept delivery through any duly empowered agent, whether an elective officer of the corporation or a building superintendent, and an individual owner could do likewise through any agent representing him as

building superintendent or general superintendent. But the statute has in terms made the general contractor the owner's agent for the purpose of instancing the delivery of material. By the terms of the statute such contractor is put on a parity with the owner himself. He is as much the owner's agent for the purposes of the act as any other agent and under the general law of agency the act of the agent is the act of the owner. Yet it is conceded that the Supreme Court of Washington has repeatedly held that a delivery to a contractor away from the lien premises is not a furnishing sufficient to give rise to a lien under the statute. Wherein, then lies the distinction?

Under our statute the right to a lien depends not upon the question at whose instance the materials were furnished, for the instancing of the owner and of his contractor are expressly put upon the same basis, but that right depends upon the *furnishing of the material*—that is, according to the Supreme Court's construction, the delivery to the lien premises. A delivery in every case is the primary requisite. It is wholly wanting in both of the cases here involved.

But it is said in the opinion:

“The Supreme Court of the State has repeatedly held that delivery at the building is essential where the material is furnished to a contractor. The reason for the rule is that a more liberal construction of the statute

“would permit of the grossest fraud on the
 “part of contractors and is not necessary for
 “the protection of bona fide materialmen.”

The only case where we can find this reason assigned is in the opinion rendered by Judge Rudkin, when Chief Justice of the Supreme Court of the the State of Washington, in *Gate City Lumber Company vs. Montesano*, 60 Wash. 586. There, however, the action was not for the foreclosure of a materialman's lien but upon a contractor's bond and in the opinion it was expressly noticed that, unlike a lien case, there was no requirement of giving notice of the commencement of furnishing materials:

“The appellant first contends that the
 “action against it cannot be maintained because
 “the respondent failed to deliver or mail to
 “the owner or reputed owner of the property
 “a duplicate statement of the material furn-
 “ished, as required by section 1 of the act of
 “March 4, 1909, Laws of 1909, p. 71 (Rem.
 & Bal. Code, section 1133.) This section is
 “a part of the mechanic's lien law of the state,
 “and has no application to a case of this kind.
 “The act requiring municipalities to take bonds
 “from contractors is complete in itself and
 “contains no provision or requirement such
 “as the appellant relies on here.”

Whatever cogency may inhere in the reasoning of the Court in the instant case—above quoted—

when applied to cases involving bonds given by contractors on public works, ceases to be of effect when applied to a lien case. The basis for such reasoning is wanting in the present case, and as the opinion intimates when the reason fails the rule fails.

The result is inescapable. Of the grounds assigned for differentiating this case from those previously decided by the Supreme Court, the second has been demonstrated to be baseless. The Supreme Court of the State has considered the precise situation described in the opinion as never before considered and has held that the term "furnishing" in the statute requires delivery to the premises even though the materials be specially designed and manufactured. The settled law of the state therefore denies any distinction or difference on this ground.

The first ground assigned has also been shown to be rather a hair splitting distinction without any difference so far as reason and principle applicable thereto are concerned. If such nicety of distinction is to be adopted then we submit that the cases of *Western Hardware & Metal Co. vs. Maryland Casualty Company*, 105 Wash. 54; and *Holly-Mason Hardware Co. vs. National Surety Co.*, 107 Wash. 74, are not irreconcilable but that there is a cleancut distinction on the facts and according to the statute involved. In the Holly-Mason case supplies or materials were delivered to the *general contractor* away from the seat of the

building operations. In the earlier case supplies or materials were similarly delivered to a *subcontractor, not the general contractor*. The statute involved provides that the bond sued upon shall be conditioned that the contractor shall "pay all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work." (Rem. Code, Sec. 1159). The decision in the Western Hardware case definitely rests upon this express provision of the statute (See 105 Wash. at page 59).

The present case is of equitable cognizance but in conformity to established principles and subject to the construction heretofore placed upon the lien statute by the Supreme Court of the state. The opinion as filed is a general equity review but runs counter to the established construction by the state court. In equity and good conscience an opportunity through a rehearing should be granted for the correction thereof.

As we said at the outset of this petition, so we repeat that we are sincerely appreciative of the early attention which this cause received at the hands of this court. It is eminently desirable that the questions involved in this appeal be finally determined as speedily as possible, to the end that some disposition may be made of the uncompleted building. But, nevertheless, we are so firmly convinced that the points covered by this petition have not been properly resolved that we cannot, in

justice to our clients, refrain from urging them with all earnestness and sincerity upon the attention of this court.

Respectfully submitted,

E. M. HAYDEN

M. A. LANGHORNE and

F. D. METZGER

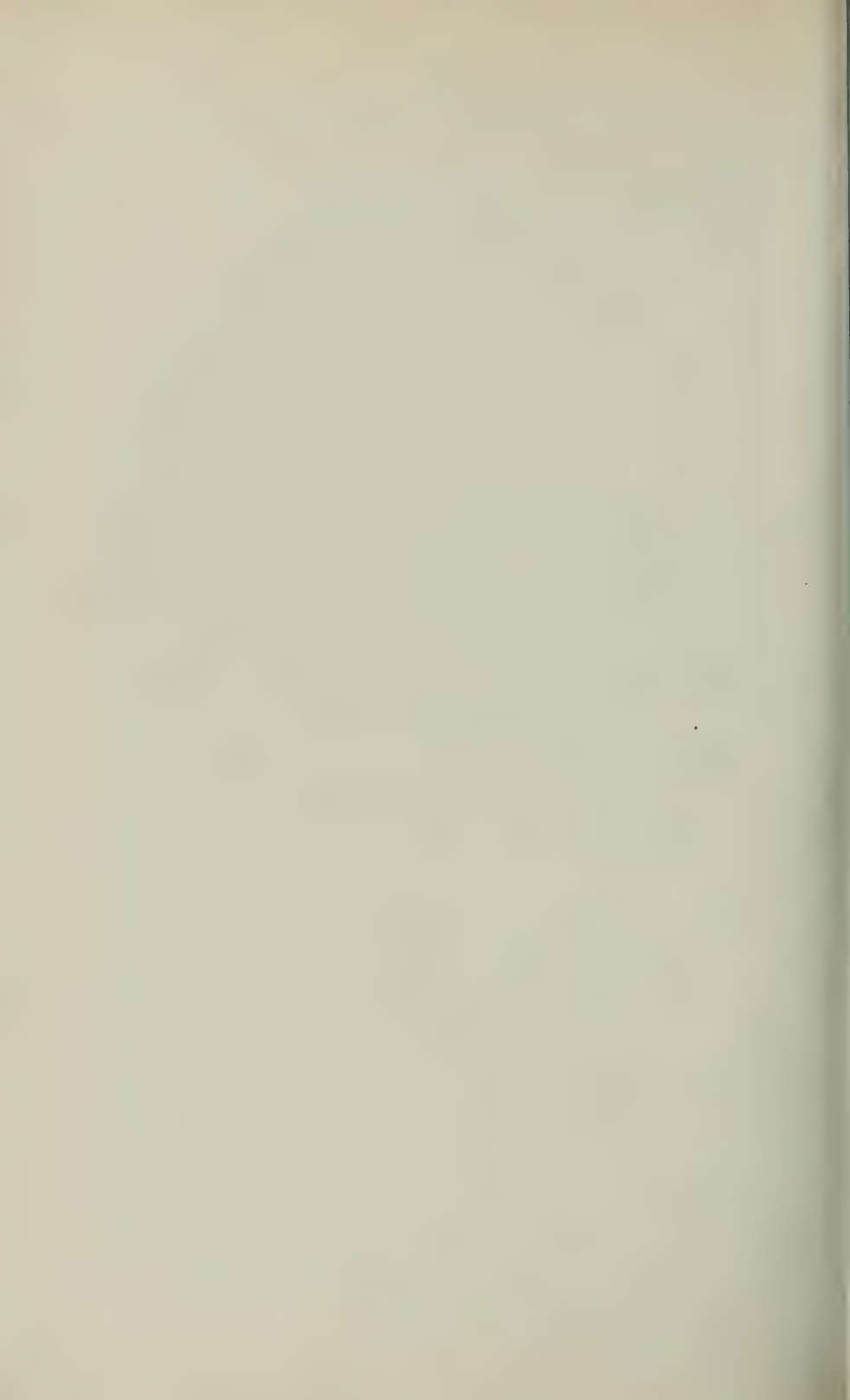
*Solicitors for McClintic-
Marshall Company.*

The undersigned solicitors for McClintic-Marshall Company do hereby certify that they have read the foregoing Petition for Rehearing and that in their judgment the same is well founded and that it is not interposed for delay.

E. M. HAYDEN

M. A. LANGHORNE

F. D. METZGER



United States
Circuit Court of Appeals
For the Ninth Circuit.

G. TRAVERSI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Northern Division of the
United States District Court of the
Northern District of California,
First Division.

FILED

JAN 12 1923

F. D. MONKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

G. TRAVERSI,

Plaintiff in Error,

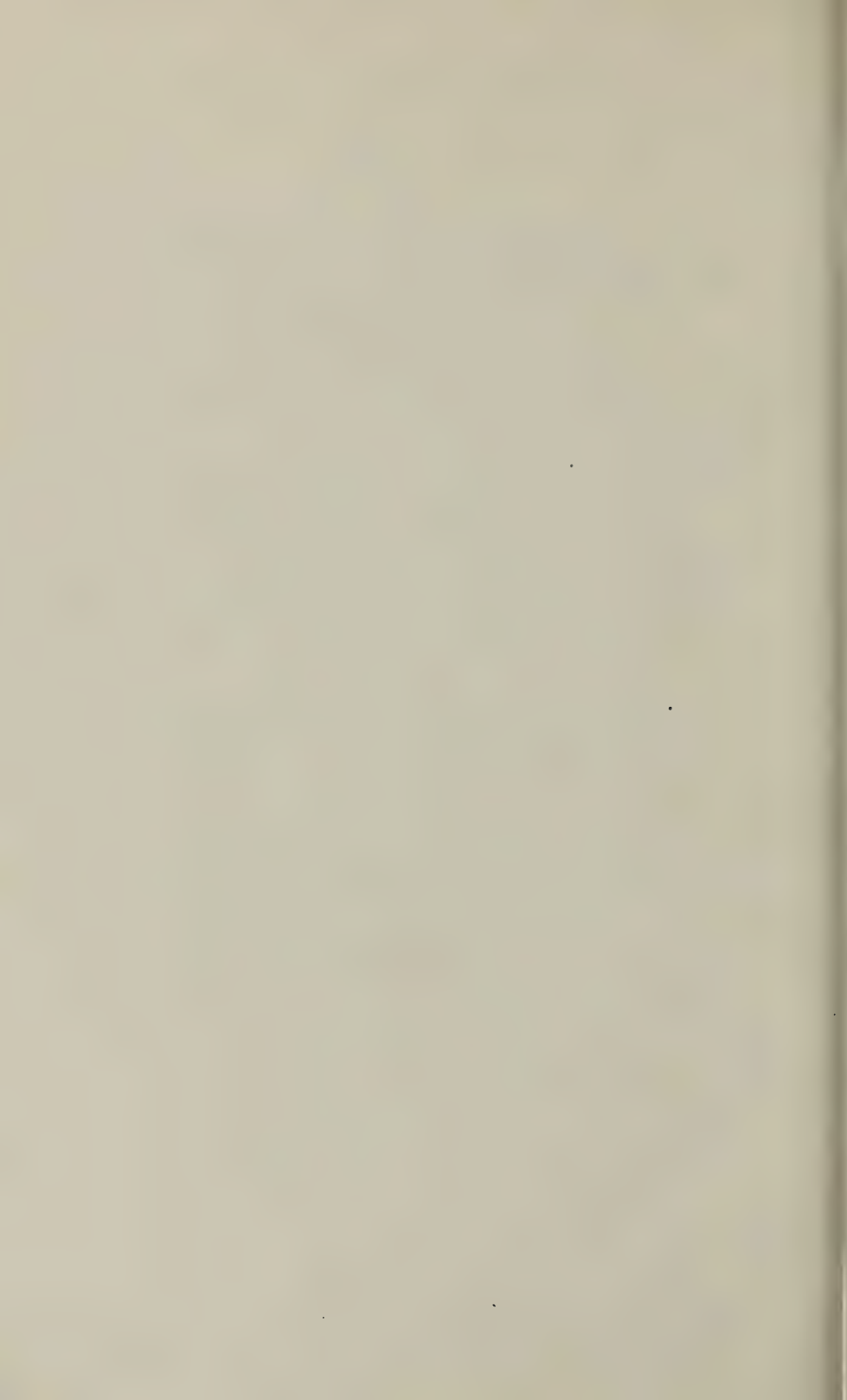
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Upon Writ of Error to the Northern Division of the
United States District Court of the
Northern District of California,
First Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

APPEARANCES:

JOHN T. WILLIAMS, U. S. Attorney, San Francisco, for the United States.

HARRY GRAY and R. PLATNAUER, Sacramento, for Plaintiff in Error.

In the Northern Division of the United States District Court, for the Northern District of California, First Division.

(No. 1271.)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. TRAVERSI and PETE TARO,
Defendants.

(Praecipe for Transcript of Record.)

To the Clerk of the Above-named Court.

You are requested to prepare a transcript of record to be filed and to file the same in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to a writ of the error allowed the defendant P. Traversi in the above-entitled cause, and to include in such transcript of record the following:

The judgment-roll in said cause, and the verdict of the jury.

The minutes of the Court of all proceedings had before the Court in said cause.

The petition for a writ of error and the assignment of errors filed therewith.

The bill of exceptions of the defendant G. Traversi after the same shall have been settled and allowed.

Dated, October 17th, 1922.

HARRY J. GRAY and
R. PLATNAUER,

Attorneys for Defendant, G. Traversi.

[Endorsed]: Filed Oct. 17, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk.
[1*]

In the Northern Division of the United States
District Court, for the Northern District of
California, First Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. TRAVERSI and PETE TARO,
Defendants.

Information.

At the April term of said court in the year of our Lord one thousand nine hundred and twenty-two—

BE IT REMEMBERED, that Ben F. Geis, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 10th day of

*Page-number appearing at foot of page of original certified Transcript of Record.

April, 1922, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents:
THAT

G. TRAVERSI and PETE TARO,
hereinafter called the defendants heretofore, to wit, on or about the 5th day of April, 1922, at 115 I St., Sacramento, in the County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this court then and there being, did then and [2] there wilfully and unlawfully maintain a common nuisance in that the said defendants did then and there wilfully and unlawfully keep for sale on the premises 115 I St. aforesaid, certain intoxicating liquor, to wit: 1 Qt. bottle $\frac{1}{3}$ full *full* of red wine then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

Against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof,

NOW, THEREFORE, your informant presents:
THAT

G. TRAVERSI and PETE TARO,
hereinafter called the defendants, heretofore, to wit, on or about the 5th day of April, 1922, at 115 I St., Sacramento, in the County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit: 1 Qt. bottle $\frac{1}{3}$ full red wine then and there containing one-half of one per cent [3] or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Con-

gress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

BEN F. GEIS,
Assistant United States Attorney. [4]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

D. D. Simpson, being first duly sworn, deposes and says: That G. Traversi and Pete Taro, on or about the 5th day of April, 1922, at 115 I St., Sacramento, County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this court, did then and there maintain a common nuisance in that the said defendants did then and there keep for sale on the said premises at 115 I St. aforesaid certain intoxicating liquor, to wit: 1 Qt. bottle $\frac{1}{3}$ full of red wine then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: That G. Traversi and Pete Taro, on or

about the 5th day of April, 1922, at 115 I St., Sacramento, County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this court, did then and there possess certain intoxicating liquor, to wit: 1 Qt. bottle $\frac{1}{3}$ full of red wine then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful [5] and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

D. D. SIMPSON.

Subscribed and sworn to before me this 7th day of April, 1922.

[Seal] THOMAS J. FRANKLIN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Apr. 10, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Dep. Clerk.

(Back.)

Oct. 2, '22. Defts. arr., pl. not guilty.

Oct. 11, 1922—Trial. Verdict of Jury.

G. Traversi—Guilty.

Pete Taro—Not Guilty.

Contd. to Oct. 13, 1922, for Judg't.

Oct. 13, 1922. Or. deft. Traversi pay fine \$500 and be impr. 3 mos., Sacto. Co. Jail, and in default pagt. fine be impr. further period of 5 mos.—terms to run consecutively. [6]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Tuesday, the 2d day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 1271.

UNITED STATES OF AMERICA

vs.

G. TRAVERSI and PETE TARO,

Minutes of Court—October 2, 1922—Arraignment.

The defendants being present with Harry Gray, their attorney, and K. M. Green, Assistant United States Attorney, appearing for the United States, the said defendants were duly arraigned upon the information filed herein, stated their true names to be as contained therein, and to the said Information plead not guilty, which pleas the Court ORDERED be and the same are hereby entered.

On motion of Mr. Green FURTHER ORDERED that this cause be and the same is hereby set for trial October 11, 1922. [7]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Wednesday, the 11th day of October, in the year of our Lord one thousand nine hundred and twenty-two, Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 1271.

UNITED STATES OF AMERICA

vs.

G. TRAVERSI and PETE TARO,

Minutes of Court—October 11, 1922—Trial.

This cause came on this day for trial, K. M. Green, Assistant United States Attorney, appearing on behalf of the Government, and the defendants being present with their attorney, Harry Gray. Thereupon, the following named persons, to wit:

Mat Rainey,	Earl D. Jelley,
Wm. L. Haley,	H. C. Muddox,
Chester E. Gruhler,	Walter D. Young,
Leroy L. Cramer,	Harry E. Magee,
B. C. French,	F. B. Fancher, and
C. F. Prentiss,	Chas. C. Geiger,

twelve good and lawful jurors were, after being examined under oath by counsel for both sides, duly accepted and sworn to try the issue joined herein. Mr. Green made the opening statement for the Government. V. H. deSpain, W. W. Greer and A. D.

Etienne were sworn and testified on behalf of the Government, and the Government rested. Pete Taro and G. Traversi, the defendants, were sworn and testified on their own behalf, and the defendants rested. The evidence being closed, counsel waived argument and the Court having instructed the jury [8] they retired at 3:30 o'clock P. M. to deliberate upon their verdict. At 3:55 o'clock P. M. the jury returned into court and having been asked if they had agreed upon their verdict, they answered in the affirmative and returned the following verdict, which was ORDERED recorded, to wit:

“We, the Jury, find G. Traversi and Pete Taro, the defendants at the bar

G. Traversi Guilty,

Pete Taro Not Guilty.

C. F. PRENTISS,

Foreman.”

The jurors having been asked if said verdict as recorded was their verdict, they answered that it was. ORDERED, that the defendant Pete Taro be discharged and that his bond be exonerated. FURTHER ORDERED that this cause be and the same is hereby continued until October 13, 1922, for judgment as to the defendant G. Traversi. FURTHER ORDERED that the jury be excused from further consideration of this case. [9]

In the Northern Division of the United States District Court for the Northern District of California.

No. 1271.

THE UNITED STATES OF AMERICA

vs.

G. TRAVERSI and PETE TARO.

Verdict.

We, the Jury, find G. Traversi and Pete Taro, the defendants at the bar,

G. Traversi Guilty.

Pete Taro Not Guilty.

C. F. PRENTISS,

Foreman.

[Endorsed]: Filed October 11, 1922, at 3 o'clock and 55 minutes P. M. Walter B. Maling, Clerk.
By J. A. Schaertzer, Deputy Clerk. [10]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Friday, the 13th day of October, in the year of our Lord, one thousand nine hundred and twenty-two. Present: the Honorable WILLIAM C. VAN FLEET, District Judge,

No. 1271.

UNITED STATES OF AMERICA

vs.

G. TRAVERSI.

Minutes of Court—October 13, 1922—Entry of Judgment.

This cause came on regularly this day for entry of judgment as to the defendant G. Traversi. The defendant being present with Harry Gray, his attorney, and K. M. Green, Assistant United States Attorney, appearing on behalf of the United States, the defendant was called for judgment. The defendant was asked if he had any legal cause to show why judgment should not be pronounced herein. V. H. deSpain and John D. McKinney were sworn and testified on behalf of the Government and C. Meredith, G. H. Jurgens and Joe Oliva were sworn and testified on behalf of the defendant. Thereupon no sufficient cause being shown or appearing to the Court why judgment should not be entered herein, the Court ORDERED that the said defendant G. Traversi, for the offense for which he stands convicted, pay a fine in the sum of Five Hundred (\$500.00) Dollars and be imprisoned for the period of three (3) months and in default of the payment of the said fine, that he be imprisoned for a further period of five (5) months, said periods of imprisonment to run consecutively. FURTHER ORDERED that imprisonment be by confinement in the County Jail, Sacramento County, California. FURTHER ORDERED that the defendant be and he is hereby granted a stay of execution of judgment until October 17, 1922. [11]

In the Northern Division of the United States District Court for the Northern District of California.

No. 1271.

Convicted Viol. Act. Oct. 28, 1919.

UNITED STATES OF AMERICA

vs.

G. TRAVERSI.

Judgment on Verdict of Guilty.

K. M. Green, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the Information filed on the 10th day of April, 1922, charging him with the crime of violation of the Act of Oct. 28, 1919; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 11th day of October, 1922, to wit:

“We, the Jury, find G. Traversi and Pete Taro, the defendants at the bar

G. Traversi	Guilty,
Pete Taro	Not Guilty.

C. F. PRENTISS,
Foreman.”

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment:

THAT WHEREAS the said G. Traversi having been duly convicted in this Court of the crime of violation of the Act of Oct. 28, 1919:

IT IS THEREFORE ORDERED AND ADJUDGED that the said G. Traversi pay a fine in the sum of Five Hundred (\$500.00) Dollars and that he be imprisoned for the period of three (3) months, and in default of the payment of said fine that he [12] be imprisoned for a further period of five (5) months, said periods of imprisonment to run consecutively.

FURTHER ORDERED that imprisonment be by confinement in the County Jail, Sacramento County, California.

Entered this 13th day of October, 1922.

WALTER B. MALING,
Clerk.

By Thomas J. Franklin,
Deputy Clerk. [13]

In the Northern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 1271.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. TRAVERSI and PETE TARO,
Defendants.

Petition for Writ of Error.

To the Honorable the Northern Division of the District Court of the United States for the Northern District of California.

The defendant G. Traversi presents this his petition for a writ of error to the Northern Division of the District Court of the United States for the Northern District of California; and in support of said petition he respectfully shows:

That on or about the 13th day of October, 1922, there was rendered and entered in the above-entitled cause in the said District Court of the United States, a judgment that said defendant G. Traversi pay a fine of five hundred dollars (\$500.00) and that he be imprisoned in the County Jail of Sacramento County, State of California, for the term of three (3) months and in default of payment of said sum of five hundred dollars (\$500.00) he be further imprisoned for five (5) months; that in the records thereof, had in said cause and in said judgment, and in the proceedings had prior thereunto in said cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

WHEREFORE said defendant prays that a writ of error may [14] issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in said cause, duly authenti-

cated, may be sent to the said Circuit Court of Appeals.

Dated, October 17th, 1922.

HARRY J. GRAY,
R. PLATNAUER,

Attorneys for Defendant, G. Traversi.

Receipt of a copy of the within is hereby admitted
this —— day of October, 1922.

KENNETH M. GREEN,
Asst. U. S. Atty.

[Endorsed]: Filed Oct. 17, 1922. Walter B.
Maling, Clerk. By Thomas J. Franklin, Deputy
Clerk. [15]

In the Northern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 1271.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

G. TRAVERSI and PETE TARO,
Defendants.

Assignment of Errors.

And now comes the defendant G. Traversi, by his
attorneys, and says that in the aforesaid proceed-
ings and in the judgment made, rendered and en-
tered therein, there is manifest error, in this, to wit:

1. The information, under which said defendant

was tried fails to state facts sufficient to constitute a public offense.

2. Said information fails to state facts sufficient to show that said defendant had violated the law, or that he was guilty of any offense.

3. Said information is insufficient to sustain a conviction.

4. The first count of said information fails to state facts sufficient to constitute a public offense.

5. The first count of said information fails to state facts sufficient to show that said defendant had violated the law, or that he was guilty of any offense.

6. The first count of said information is insufficient to sustain a conviction.

7. The second ~~part~~ of said information fails to state facts sufficient to constitute a public offense.

8. The second count of said information fails to state facts sufficient to show that said defendant had violated the law, or that he was guilty of any offense. [16]

9. The second count of said information is insufficient to sustain a conviction.

10. The District Court erred in giving to the jury that portion of the charge of the Court given to the jury which is as follows:

“The first count of this information charged the defendants with maintaining a common nuisance, and a nuisance under this act is defined thus, ‘Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, and all intoxicating

liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance,' that is, it simply means that where liquor is kept in a building or a structure where it is not permitted to be kept under the prohibition act the maintaining of it is deemed for illicit and illegal purposes and it constitutes what is denominated there a common nuisance. Now under the National Prohibition Act one may keep liquor in their private dwelling on premises that is devoted solely to the use by them of a private dwelling, liquor for their own use and consumption and that of their family but not otherwise. Any liquor that is maintained in a place which is not exclusively that residence, although the parties may live upon the premises, if it is devoted partly to use as a saloon or soft drink place, or a hotel or any, other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law. Now that is the charge in the first count here."

(a) For that said first count charged said defendant with maintaining a common nuisance in that said defendant wilfully and unlawfully did "keep for sale" on certain premises certain "intoxicating" liquor:

(b) For that the Court in giving said instruction that the "keeping" of any liquor in a building or structure where it is not permitted to be kept under the prohibition act, constitutes a common nuisance. [17]

(c) For that the Court in giving said instructions assumed to pass upon the question of fact that the liquor with which said defendant was charged with keeping for sale was intoxicating liquor, as the same is defined in the National Prohibition Act.

(d) For that the Court in giving said instructions assumed to pass upon the question of fact that said intoxicating liquor was kept for sale by said defendant upon said premises.

(e) For that said first count of the information charged that said defendant wilfully and unlawfully kept said intoxicating liquor for sale on said premises; and said instruction omits the element of wilfully keeping intoxicating liquor for sale.

11. The District Court erred in giving to the jury that portion of the charge of the Court given to the jury, which is as follows:

“It is true as the United States Attorney suggests that it is not necessary under this act that it be shown that any positive sale or dispensing of liquor was going on at the time provided it is shown that there was liquor maintained on the premises. Section 33 of the act provides: ‘After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title.’ In other words where liquor is

found upon the premises that are not of the character of those described in the act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is *prima facie* evidence that it was there for an illegal purpose under the law. As I say the only place where liquor is permitted to be maintained under the Prohibition Act is one's private residence, premises devoted solely to the occupation and use as such. It is true that where one lives at a hotel or lives in a flat, or lives in apartments, exclusively devoted to the purposes of residence he may keep and maintain [18] liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going elsewhere and enjoy it with his meals. For the purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this act so that the law shall not be subject to any pretense that it is being used under such circumstances solely for the use of the parties. If the defendant Traversi is testifying truthfully that he was taking this with him to some place where he was going to have his lunch he would be violating the law because if he maintained it in his private residence or maintained it in a room occupied by him as a private residence he would be entitled to have it there and serve his family there, but not permitted to take it off the premises."

(a) For that the same is not called for or justified by the evidence.

(b) For that the Court in giving said instruction that the *prima facie* presumption that liquor is being kept for the purpose of being sold, as prescribed by section 33 title II of the National Prohibition Act, cannot be rebutted by evidence which, although true, tends to show the commission of some other offense under the act, but which conclusively shows that such liquor was not being kept for sale, or for the purpose of being sold, and which, taken to be true, proves conclusively that the offense charged in the first count of said information was not committed by the defendant.

(c) For that the Court, in giving said charge, instructed the jury that the possession of liquor in a place where the same is not permitted to be kept, is conclusive evidence that such liquor was kept there for the purpose of being sold, and was kept for sale.

12. The District Court erred in giving to the jury that portion of the charge of the Court given to the jury, which is as follows: [19]

“The second count is that on the same date the defendants had in their possession the liquor that is charged here as having been taken from the defendant Traversi. This quart of red wine. Now possession, of course, you all understand what that means. It means either having it in your hands, your pockets, or on premises immediately under your control. That is, in law, in your possession, and the defendants are charged with having this liquor

in their possession and under circumstances which is not warranted under the Act."

(a) For that the same is not called for or justified by the evidence.

(b) For that the mere possession of intoxicating liquor, even if such possession be in a place prohibited by the National Prohibition Act, is no offense, and that the law provides no penalty thereof.

(c) For that Congress has no power to constitute the mere possession of intoxicating liquor, in any place whatever, a crime.

(d) For that the second count of said information charged that said defendant did wilfully and unlawfully possess certain intoxicating liquor on said premises, and said instruction omits the element of wilfully possessing said intoxicating liquor.

13. The District Court erred in entering said judgment and imposing sentence upon the verdict of guilty in the manner and form as done.

14. The District Court erred in pronouncing judgment upon said verdict.

HARRY J. GRAY and
R. PLATNAUER,

Attorneys for Defendant and Plaintiff in Error
G. Traversi.

Receipt of a copy of the within is hereby admitted
this — day of October, 1922.

KENNETH M. GREEN,
Asst. U. S. Atty.

[Endorsed]: Filed Oct. 17, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [20]

In the Northern Division of the United States District Court, for the Northern District of California, First Division.

No. 1271.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. TRAVERSI and PETE TARO,

Defendants.

Order Allowing Writ of Error.

On this 17th day of October, 1922, came the defendant, G. Traversi, by his attorney, and filed herein and presented to the Court his petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. On consideration whereof, it is ordered that said writ of error be and the same is hereby allowed.

Dated this 17th day of October, 1922.

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed Oct. 17, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [21]

In the Northern Division of the United States District Court, for the Northern District of California, First Division.

No. 1271.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. TRAVERSI and PETE TARO,

Defendants.

**Order Dated October 17, 1922, Extending Time
Ten Days to File Bill of Exceptions.**

For reasons appearing to the Court, it is ordered that the time allowed the defendants to file his bill of exceptions in this case be and the same is hereby extended for the period of ten days in addition to the time allowed by law.

Dated, October 17th, 1922.

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed Oct. 17, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [22]

In the Northern Division of the United States District Court for the Northern District of California.

No. 1271.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

G. TRAVERSI and PETE TARO,

Defendants.

(Bill of Exceptions.)

BE IT REMEMBERED, that on the trial of this cause in this Court at the October term on the 11th day of October, A. D. 1922, of said Court, the Hon. Wm. C. Van Fleet, Judge presiding, when the following proceedings were had, to wit: A jury was impaneled and sworn according to law, and thereupon the plaintiff, to sustain the issue upon its part offered the testimony of the following witnesses as his evidence in chief:

Testimony of V. H. De Spain, for the Government.

V. H. DE SPAIN, a witness sworn on behalf of the plaintiff, testified as follows: I am a Federal prohibition agent, and was such on the 5th day of April, 1922. I am familiar with the premises, 115 "I" Street, in this city. I visited those premises on the date last mentioned. I saw the defendant Taro first; he was back of the bar. He was in his shirt-sleeves. At the time I entered the place he was serving two patrons with beer. I told him I

(Testimony of V. H. De Spain.)

was a Federal Prohibition Agent, and told him to step out from behind the bar, and, as he did, he started fighting with us. We entered the bar, and Agent Wrinkle held him there. Agents Plant and Greer were with me among other agents. About that time I saw the other defendant Traversi; at the end of the bar there was a door that leads into a hallway and then upstairs, and he came through that doorway with a bottle of wine in his hands, and I took it from him. I labeled it and turned it over to Mr. Greer to hold as evidence. There were four or five people in the premises at the time I and the other agents were in there. They were all up to the bar. They were drunk. They displayed that by staggering. [23]

Cross-examination by Mr. GRAY, Attorney for the Defendants.

Taro was back of the bar when I went into the place. Q. "Did you see Mr. Taro handle any liquor of any kind or nature?" A. "Beer, that is what he was doing when I went in." I did not take any of that beer as a sample; I think that was near beer. I never saw him have in his possession anything but this near beer. He was acting as bartender back of the bar serving drinks. I did not see Taro serving liquor of any kind other than the beer.

To the COURT.—I did not have the beer tested as to its character. I saw Taro serve nothing but beer. The four or five people that were in the

(Testimony of W. W. Greer.)

saloon at the time I went in there were drunk. I do not know where they procured their liquor to get drunk on.

Testimony of W. W. Greer, for the Government.

W. W. GREER, a witness sworn on behalf of the plaintiff, testified as follows:

I am a Federal prohibition officer, and was such on April 5th, 1922. I am familiar with the premises 115 "I" Street in this city. It is an old-fashioned saloon premises. I visited it on the day last mentioned. Q. "Do you know the defendants in this case?" A. "Yes, I have seen them." I saw them there on that date. I first saw the one that had his coat off—referring to the defendant Taro—he appeared to me to be bartender in the act of waiting on the bar. He had his coat off. He was standing behind at the end of the bar when I came in.

Q. "Did you hear a conversation with and see anything happen between him and agent De Spain?" A. "It was between him and Agent Wrinkle." Q. "What happened between them?" A. "Oh, they had a scuffle."

Q. "Did you hear anyone announce that you were all Federal Agents?" A. "We always do that when we first go in."

I did not hear it done in this case, because I was about the third one that went in. I saw the defendant Traversi after I had seen the other defendant. I saw him coming out through this door at the end

(Testimony of W. W. Greer.)

of the bar; into behind the bar. He had a bottle and De Spain took it away from him. Q. "Do you know [24] what was in the bottle?" A. "He had a bottle of red wine." Q. "How do you know it was red wine?" A. "We always examine those bottles for evidence." Q. "Did you on this occasion?" A. "Yes, we smelt it and tasted it and sampled it and it was red wine." I have been a Federal Prohibition Agent about a little more than a year. I have on numerous occasions sampled wine and other intoxicating liquors; we have to do that every day. Q. "And, based upon your experience, do you testify that that was wine?" A. "Yes." Q. "Containing more than one-half of one per cent of alcohol by volume?" A. "Yes." After I got the bottle of wine from agent De Spain, we corked it up and put a label on it, sealed it with red wax, and delivered it to the United States Marshal.

Cross-examination by Mr. GRAY, Attorney for the Defendants.

I did not take the bottle of wine from Mr. Traversi. Mr. De Spain handed it over the counter to me. I am well acquainted with the premises from my observation at that time. Q. "Did you visit the room where that door leads to?" A. No sir, I didn't go beyond that door. (To the Court.) The door is behind the bar, at the end of the bar next to the street. I did not go through that door. Q. "You don't know anything about what was beyond that door?" A. "I had no busi-

(Testimony of W. W. Greer.)

ness in there." I did not see Mr. Taro handling any liquor that I would call intoxicating liquor or anything else. Q. "Was there anyone else present, Mr. Greer, besides the prohibition agents and Mr. Taro, and Mr. Traversi and the two or three men that you heard Mr. De Spain say were in the room?" A. "The wife of the defendant was present." Q. "You say Mrs. Traversi was there?" A. "I suppose she was there the way she acted." She did not say a word during the time I was there. I did not see Mr. Traversi serving a meal at that time. (To the Court.) There were five or six men in the saloon.

I saw no liquor served to any of them. I saw no liquor [25] that was being brought through that door. I made further search of the premises, and found no other liquor.

Testimony of A. D. Etienne, for the Government.

A. D. ETIENNE, a witness sworn on behalf of the plaintiff, testified as follows:

I am a chemist in the United States Internal Revenue Service, and have been such ever since the 5th day of April, 1922.

Q. "Did you ever see this bottle of wine that was seized at 115 'I' Street in this city on the 5th day of April, 1922?" A. "Yes. It was brought to the laboratory in San Francisco on June 29th, and we made a test of it."

Q. "What did you find to be the contents of the bottle?" A. "Nine and seven-tenths per cent alcoholic content by volume." It was red wine.

(Testimony of Pete Taro.)

The defendant, G. Traversi, to sustain the issue on his part, offered the testimony of the following witnesses as his evidence in chief:

Testimony of Pete Taro, for Defendant.

PETE TARO, a witness, sworn on behalf of the defendant, testified as follows:

A. "Mr. Taro you are one of the defendants in this case here with Mr. Traversi charged with the violation of the Volstead Act on April 5th, 1922?"

A. "I was boarding in the house, and I was sick in my legs. I got broke legs over in Jackson."

Q. "How did you come to be at 115 'I' Street on the 5th day of April, 1922?" A. "I was there 1921, September." On the 5th day of April, 1922, I was not working there at the hotel at 115 'I' Street; I was boarding there, that is all. I did not handle any liquor while I was there. I had no connection whatever with the hotel. I met Agents Wrinkel, De Spain, Greer and Mr. Plant on the 5th day of April, 1922, on the occasion of their visit to those premises, when they came behind the bar. I was close to the stove, and he grabs me and puts me for bartender; and Mr. Traversi and wife going to eat but never got to eat. He got that red wine to go and eat. He was sick at that time. And the dry agent jumped and grabbed Mr. Traversi, and he grabbed me while I was close to the stove and he put me for bartender. [26] I said, "I got nothing to do with this joint, I am boarding here"; and he says, "You stay there," and grabbed me by the neck and threw me down. That is all.

(Testimony of Pete Taro.)

Q. (By the COURT.) "Where did you get the red wine did you say?" A. "He was behind the door. He was just going to eat." Mr. Traversi had it. I don't know where he got it. He was sick at that time and he was going to eat. "Do you know where he got the wine?" A. "No, I don't know nothing about that."

I am not a bartender, and had nothing to do with that place, and was not working there.

Cross-examination by Mr. GREEN.

I was never behind the bar at all. I had my coat off and I was inside the saloon. I didn't have my coat on all the time. I was standing up by the stove. I was not behind the bar at all.

Testimony of G. Traversi, for Defendants.

G. TRAVERSI, one of the defendants, a witness sworn on behalf of the defendants, testified as follows:

I am the proprietor of the hotel at 115 "I" Street; and was such on April 5th, 1922.

Q. "Will you please state to the jury the circumstances of your having the red wine and the raid that was made in your place that day?" A. "Yes, I have it. I got it to take lunch and when I came in I said, 'I go get a little bit of wine,' and when I came back my wife says, 'Go and get a little wine and I will fix lunch,' and I go to my room and I take half a bottle of wine, and then I come down. When I reached the door the man here grabbed me. I had no chance to go in. That is all." I am in

(Testimony of G. Traversi.)

the habit of using wine with my meals. I like wine. Q. "Where did you eat your meals on that day?" A. "On that day I do not eat at all."

Mr. Taro was not employed by me on that day. He never worked for me. He was never in my employ, just boarded at my house. He was there more than a year, but never worked for me. [27] He had no authority to handle liquor in my house; nor did he have any authority from me to handle any liquor. I do not keep liquor in my premises for sale. Q. "Had you prior to this, on the 5th day of April, been selling any liquor there?" A. "No, sir." Q. "The liquor then that you had there—how long had it been there?" A. "I got it just for myself when I want to eat."

Cross-examination by Mr. GREEN.

Q. "What meal were you going to eat with that bottle of wine?" A. "I tell you. I had some sausage, I took some of that sardinia and lots of things." It was lunch. Q. "What time do you usually eat lunch?" A. "At that time I don't remember what time. I came from the country, I stay about seven miles out. I come just at that time. Maybe half-past three or four o'clock." Q. "What time do you usually eat your lunch?" A. "Lunch—I eat regular at twelve and six, but that day I don't remember what time."

The COURT.—"He means that he eats regularly at twelve and then at six."

On that day it was late. It was half-past three or four o'clock; I don't remember.

(Testimony of G. Traversi.)

Taro never used to help me out. He never helped me out. He never go back of my bar, he wasn't there at all, sometimes he go and take a glass of water. (To the Court.) J. Boizone was running the bar when I was not there. At that time when the federal agents came in, I was tending bar myself."

Q. "Were you tending bar?" A. "Yes, when I come at that time." When I came in with the bottle I was tending bar.

This was all the evidence in the case; and at its conclusion, both the plaintiff and the defendants having waived argument, the Court charged the jury as follows:

The COURT.—Gentlemen, the charge against these defendants you have heard stated. The first count of this information [28] charges the defendants with maintaining what is denominated a common nuisance and a nuisance under this Act is defined thus, "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance." That is, it simply means that where liquor is kept in a building or a structure where it is not permitted to be kept under the Prohibition Act the maintaining of it is deemed to be for illicit and illegal purposes and it constitutes what is denominated a common nuisance. Now under the National Prohibition Act

one may keep liquor in their private dwelling on premises that are devoted solely to the use by them of a private dwelling, liquor for their own use and consumption and that of their family but not otherwise. Any liquor that is maintained in a place which is not exclusively the residence, although the parties may live upon the premises, if it is devoted partly to use as a saloon or soft drink place, or a hotel or any other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law. Now that is the charge in the first count here. The second count is that on the same date the defendants had in their possession the liquor that is charged here as having been taken from the defendant Traversi. This quart of red wine. Now possession, of course, you all understand what that means. It means either having it in your hands, your pockets or on premises immediately under your control. That is, in law, in your possession and the defendants are charged with having this liquor in their possession and under circumstances which are not warranted under the Act.

“Now, the evidence of the Government here is such that, if you believe it, would leave no question as to the guilt of these defendants, if it satisfies you to the extent that the law requires and that is, satisfies your minds to a degree that you would be willing to act upon it in the important affairs of your [29] own life, because that in law is deemed to be proof beyond a reasonable doubt. Now, the

defendant here, Traversi, admits the possession of this wine—he admits the possession of it under circumstances which would not justify its possession if had for the purpose that he testified because the law does not warrant it or authorize it. The defendant Taro denies that he was employed there as bartender or otherwise and claims that he was employed there merely as a boarder and that he had nothing to do with the dispensing of any liquor which would be contraband under this Act. Of course, if you believe that to be true or the evidence on that point is such as to leave a reasonable doubt in your minds as to whether he was there under the circumstances testified to by the Government agents, that would entitle him to an acquittal. He must have been there as bar-keeper, not necessarily regularly employed as bar-keeper, but if he was voluntarily acting as bar-keeper or was dispensing liquors illegally he would be guilty just as though he was employed there. One cannot do that in premises of that kind and escape by saying that they were not employed there. It is not essential that there should be any regular employment but he must have been there acting in such capacity as would enable you to say that he was handling illicit liquor and if he was the fact that he was not regularly employed there, the fact that he may have been there merely temporarily during the absence of the proprietor would not render him less guilty than if he were regularly employed there, provided he was there for the purpose of aiding or assisting in carrying on an illicit traffic. Now the facts as

they have been submitted to you are very simple. It is merely a question whether you believe the testimony of the agents of the Government on the one hand or the testimony of the defendant Taro on the other, because as to Taro that question is raised. As to the other defendant, he admits that he was there at the time and came in with this bottle of liquor in his possession and I charge you that if that is so he was not entitled under this Act to have that liquor in his possession. Is there anything [30] *anything* else that counsel would like to ask?

Mr. GRAY.—No.

Mr. GREEN.—I don't know, Your Honor, whether the jury would get this idea from the instructions or not—I don't think it would be necessary for the Government to prove that the defendant Taro was caught in the very act of handling illicit liquor if he was there as bar-tender.

The COURT.—I am glad you called my attention to it. It is true as the United States Attorney suggests that it is not necessary under this Act that it be shown that any positive sale or dispensation of liquor was going on at the time, provided it is shown that there was liquor maintained on the premises. Section 33 of the Act provides: 'After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions

of this title.' In other words, where liquor is found upon premises that are not of the character of those described in the Act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is *prima facie* evidence that it was there for an illegal purpose under the law. As I say the only place where liquor is permitted to be maintained under the Prohibition Act is in one's private residence, premises devoted solely to the occupation and use as such. It is true that where one lives at a hotel or lives in a flat, or lives in apartments, exclusively devoted to the purposes of residence he may keep and maintain liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going somewhere else and enjoy it with his meals. The purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this Act so that the law shall not be subject to any pretense that it is being used under such circumstances solely for the use of the parties. [31] If the defendant Traversi is testifying truthfully that he was taking this with him to some place where he was going to have his lunch he would be violating the law because if he maintained it in his private residence he would be entitled to have it there and serve his family there, but not permitted to take it off those premises."

Mr. GRAY. (Attorney for Defendants).—"I don't think the testimony states that he did take it from the premises."

Mr. GREEN.—He testified that he was going out to get some lunch. He lives in the hotel.

The COURT.—You cannot make an entire hotel your private residence.

Mr. GREEN.—He stated on cross-examination that he was on duty as bartender when he had this wine in his hands and I don't think it is necessary for the Government to prove that the defendant Taro was actually engaged in the dispensing of liquor, intoxicating liquor, at the time the officers came in. If it is shown that Traversi was maintaining a nuisance there and that Taro was back of the bar and assisting him in it, I think he is guilty.

The COURT.—“I advised the jury precisely that way. It is not necessary to show that he was employed there. If he was aiding in dispensing liquors in an establishment that was violating the law, he would be guilty and if he was not he would not be guilty. If he was there merely for some other purpose of an innocent nature he would not be guilty.

A JUROR.—“May I ask a question, your Honor?”

The COURT.—“Certainly.”

JUROR.—Suppose this defendant Taro—if this was the first time that liquor was brought on the premises would that have any bearing? It has not been brought out that there was more than once that liquor was brought in.

The COURT.—“Oh, well, you must use your own judgment. You are entitled to draw reasonable deduction from the evidence that is before you and

determine whether if liquor was brought there [32] at one time in an illegal way it was not brought there for the same purpose on other occasions. It is a question of fact for you. The Court cannot instruct you as to that. You may retire, gentlemen. [33]

(Order Allowing Bill of Exceptions.)

The foregoing is a correct transcript and record of the proceedings had at the trial of the above-entitled cause, including the charge of the Court to the jury.

There were no objections or exceptions of any character taken or reserved at the trial either to evidence or the charge of the Court; but I have, at the earnest request of counsel for the defendant consented to certify the record to the end that a review may be had of any question which may be deemed to arise thereon.

WM. C. VAN FLEET,

U. S. District Judge.

San Francisco, Cal., December 2, 1922.

[Endorsed]: Filed Dec. 4, 1922. W. B. Maling, Clerk. By Thomas J. Franklin, Dep. Clerk. [34]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 34 pages, numbered from 1 to 34, in-

clusive, contain a full, true and correct transcript of certain records and proceedings, in the case of the United States of America vs. G. Traversi and Pete Taro, numbered 1271, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with "Praecipe" (a copy of which is embodied in this transcript) and the instructions of the attorney for defendant and plaintiff in error herein.

I further certify that the costs for preparing and certifying the foregoing transcript on writ of error is the sum of Thirteen Dollars and Ten Cents (\$13.10), and that same has been paid to me by the attorney for plaintiff in error herein.

Annexed hereto is the original citation on writ of error (pages 38 and 39) and the original writ of error (pages 36 and 37) with the return of the said District Court to said writ of error attached thereto (page 37).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 15th day of December, 1922.

[Seal]

WALTER B. MALING,
Clerk.

By Thomas J. Franklin,
Deputy Clerk. [35]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between G. Traversi and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said G. Traversi, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 21st day of October, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court.
By Thomas J. Franklin,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,
U. S. District Judge. [36]

Service hereof by copy hereby admitted this 24th day of October, 1922.

JOHN I. WILLIAMS,
United States Attorney.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal]

WALTER B. MALING,
Clerk U. S. District Court, Northern District of
California.

By Thomas J. Franklin,
Deputy Clerk.

[Endorsed]: No. 1271. United States District
Court for the Northern District of California,
Northern Division. G. Traversi, Plaintiff in Error
vs. United States of America, Defendant in Error.
Writ of Error. Filed at — o'clock and — Min.
— M. Oct. 24, 1922. Walter B. Maling, Clerk.
By Thomas J. Franklin, Deputy Clerk. [37]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States to The United
States of America, GREETING:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth Circuit, to be holden at the City of
San Francisco, in the State of California, within
thirty days from the date hereof, pursuant to a
writ of error duly issued and now on file in the
Clerk's office of the United States District Court for
the Northern District of California (Northern Di-
vision), wherein G. Traversi is plaintiff in error,
and you are defendant in error, to show cause, if
any there be, why the judgment rendered against
the said plaintiff in error, as in the said writ of

error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 17th day of October, A. D. 1922.

WM. C. VAN FLEET,
United States District Judge. [38]

Service hereof by copy hereby admitted this 24th day of October, 1922.

JOHN I. WILLIAMS,
United States Attorney.

[Endorsed]: No. 1271. United States District Court for the Northern District of California. G. Traversi, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed at — o'clock and — Min —M. Oct. 24, 1922. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [39]

[Endorsed]: No. 3955. United States Circuit Court of Appeals for the Ninth Circuit. G. Traversi, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Northern Division

of the United States District Court of the Northern District of California, First Division.

Filed December 16, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

G. TRAVERSI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to and Including December
16, 1922, to File Record and Docket Cause.**

For good reasons appearing, it is ordered that the time for filing the record herein in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended and enlarged until and including the 16th day of December, 1922.

Dated November 15th, 1922.

WM. C. VAN FLEET,

Judge of the U. S. District Court for the Northern District of California.

[Endorsed]: No. 3955. United States Circuit Court of Appeals for the Ninth Circuit. G. Trav-

ersi, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time. Filed Nov. 16, 1922. F. D. Monckton, Clerk. Refiled Dec. 16, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

G. TRAVERSI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to and Including January 2, 1923, to File Record and Docket Cause.

For good reasons appearing, it is ordered that the time for filing the record herein in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended and enlarged until and including the 2d day of January, 1923.

Dated December 15, 1922.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

[Endorsed]: No. 3955. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including January 2, 1923, to File Record and Docket Cause. Filed Dec. 15, 1922. F. D. Monckton, Clerk. Refiled Dec. 16, 1922. F. D. Monckton, Clerk.

No. 3955

United States
Circuit Court of Appeals

For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

R. PLATNAUER,

505 Bryte Building,

Sacramento, Cal.,

Attorney for Plaintiff in Error.



United States
Circuit Court of Appeals

For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff in Error, jointly with one Pete Taro, was informed against by the United States Attorney for the Northern District of California; the information charging him with violation of the National Prohibition Law on two counts.

First: with maintaining a common nuisance at 115 I Street, Sacramento, California, in that he wilfully and unlawfully kept for sale on such premises intoxicating liquor, namely: 1 quart bottle $\frac{1}{3}$ full of red wine containing one-half of one per cent of alcohol by volume fit for use for beverage purposes, in violation of Section 21, of Title II of said Act (p. 3, record).

Second: with unlawfully possessing, at 115 I Street, Sacramento, intoxicating liquor, namely: 1 qt. bottle $1/3$ full red wine, containing one-half of one per cent of alcohol by volume fit for use for beverage purposes, in violation of Section 3 of Title II of said Act (p. 4, record).

To this information plaintiff in error pleaded not guilty (p. 7, record). After trial, the jury brought in a general verdict of guilty against plaintiff in error (pp. 9 and 10, record), and thereafter the Court pronounced and entered its judgment, and sentenced plaintiff in error to pay a fine of \$500.00 and to be imprisoned for 3 months, and, in default of the payment of said fine, that he be imprisoned for a further period of 5 months, such periods of imprisonment to run concurrently (pp. 11 and 12, record).

From this judgment plaintiff in error sued out a writ of error to this Court (p. 14, record); and with his petition for such writ, he filed with the Clerk of the District Court an assignment of errors (pp. 15-21, record).

A writ of error was allowed by the District Court (p. 40, record).

The only evidence (p. 32, record) adduced at the trial is as follows:

Plaintiff in error is the proprietor of and conducts a hotel at 115 I Street, Sacramento, (p. 30, record). On April 5, 1922—the date mentioned in the information—three federal prohibition agents, V. H. DeSpain, W. W. Greer and one named

Wrinkle, entered the premises in question, denominated by Greer as an "old fashioned saloon premises," (testimony of DeSpain, p. 24, and of Greer, p. 26, record). At that time the defendant Taro was the only defendant there (testimony of DeSpain, p. 24, of Greer, p. 26, record). Taro was serving two patrons with what DeSpain referred to as "beer," but who, on cross-examination, stated that he thought it was "near beer," and that was the only liquor of any kind that was served (testimony of DeSpain, p. 25, record). Greer, who entered the premises behind the two other agents did not see anything served. He saw Taro, who had his coat off, and "appeared to be bartender, in the act of waiting on the bar," and who "was standing at the end of the bar" (testimony of Greer, p. 26, record). He did not see Taro handling any intoxicating liquor or anything else (testimony of Greer, p. 28, record).

While the agents were in the bar-room, plaintiff in error entered with a bottle of red wine in his hands, which Agent DeSpain took from him and handed it to Agent Greer (testimony of DeSpain, p. 25, of Greer, pp. 26 and 27, record).

His entrance is described by the witnesses as follows:

"At the end of the bar there was a door that leads into a hallway and then upstairs, and he came through that doorway with a bottle of wine in his hands" (testimony of DeSpain, p. 25, record).

While Greer testified:

"I saw him coming out through this door at the

end of the bar; into behind the bar''; and in answer to questions by the Court, he said: "The door is behind the bar, at the end of the bar next to the street. I did not go through that door." Mrs. Traversi, the wife of the defendant, was present (pp. 27 and 28, record).

The contents of the bottle taken from plaintiff in error consisted of red wine, containing nine and seven-tenths per cent alcoholic content by volume" (testimony of A. D. Etienne, p. 28, record).

Agent Greer made search of the premises, and found no other liquor (testimony of Greer, p. 28, record).

Possession of the wine is accounted for by plaintiff in error and the use to which he intended to put it is stated by him as follows:

Q. "Will you please state to the jury the circumstances of your having the red wine?" A. "Yes, I have it. I got it to take lunch, and when I came in I said, 'I go get a little bit of wine,' and when I came back my wife says, 'Go and get a little wine and I will fix lunch'; and I go to my room and I take half a bottle of wine, and then I come down. When I reached the door the man here grabbed me." I am in the habit of using wine with my meals. I like wine. On that day I do not eat at all. I do not keep liquor in my premises for sale. Q. "The liquor then that you had there—how long had it been there?" A. "I got it just for myself when I want to eat." (pp. 30 and 31, record).

On cross-examination he was asked what meal he was going to eat with that bottle of wine, and re-

plied: "I tell you, I had some sausage, I took some of that sardinia and lots of things. It was lunch."

Q. "What time do you usually eat lunch?" A. "At that time I don't remember what time. I came from the country. I stay about seven miles out. I come just at that time. Maybe half-past three or four o'clock. I eat regular at twelve and six, but that day I don't remember what time. On that day it was late. It was half-past three or four o'clock. I don't remember."

To the Court: J. Boizone was running the bar when I was not there. At that time when the federal agents came in, I was tending bar myself. When I came in with the bottle I was tending bar (pp. 31 and 32, record).

Pete Taro, the co-defendant of plaintiff in error, testified:

On April 5, 1922, on the occasion of the federal agents' visit to those premises, I was boarding at the hotel 115 I Street. Mr. Traversi and wife going to eat but never got to eat. He got that red wine to go and eat. He was sick at that time, and the dry agent jumped and grabbed Mr. Traversi. Q. (by the Court): "Where did you get the red wine did you say?" A. "He was behind the door. He was just going to eat. Mr. Traversi had it. I don't know where he got it. He was sick at the time and was going to eat."

THE QUESTIONS INVOLVED HEREIN ARE:

1. The second count of the information does not state a public offense, and is insufficient to sustain a

conviction. Assignment of errors 7, 8, 9, (p. 16, record).

2. There is *no* evidence to sustain a conviction upon the first count of the information.

3. The Court erred in its charge to the jury.

Assignment of errors 10, 11, 12 (pp. 16-21, record).

4. The Court erred in entering judgment and imposing sentence upon the verdict of guilty in the manner and form as done.

Assignment of errors 13 (p. 21, record).

5. The Court erred in pronouncing judgment upon said verdict.

Assignment of errors 14 (p. 21, record).

6. Both counts of the information are based upon the same identical facts, and plaintiff in error cannot, under the law, be convicted on *both*.

7. In a criminal case, where the liberty of the person is at stake, the Court may and should consider plain error, vital to the defendant, notwithstanding the points involved were not presented to the trial Court by demurrer, or motion in arrest of judgment, nor by exception, and are not specified in the assignment of errors.

SPECIFICATION OF ERRORS RELIED ON BY PLAINTIFF IN ERROR.

1. The second count of the information does not state a public offense, and is insufficient to sustain a conviction, and the Court had no jurisdiction to render judgment thereon.

2. There is no evidence to sustain a conviction upon the first count of the information.

3. Both counts of the information are based upon the same identical facts, and therefore plaintiff in error cannot be convicted on both.

4. The Court erred in its charge to the jury, in this:

a. The first count of the information charged plaintiff in error with maintaining a common nuisance, by unlawfully keeping intoxicating liquor fit for use for beverage purposes, for *sale*, and in its charge to the jury defining a common nuisance the Court omitted the element of keeping liquor *for sale*, and also that such liquor must be fit for use for beverage purposes.

The portion of the charge complained of is as follows, (p. 32, record):

“The first count of this information charged the defendants with maintaining a common nuisance, and a nuisance under this Act is defined thus, ‘Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance.’ That is, it simply means that where liquor is kept in a building or structure where it is not permitted to be kept under the Prohibition Act, the maintaining of it is deemed to be for illicit and illegal purposes and it constitutes what is denominated a common nuisance.”

This instruction is also erroneous for the reason

that it informed the jury they could conclude the liquor was kept on the property for any illegal and illicit purpose, even though they should determine it was not kept for sale; and that under such circumstances they might convict plaintiff in error on the first count.

b. The Court in said charge further instructed the jury (pp. 32-33, record):

“Now under the National Prohibition Act one may keep liquor in their private dwelling or on premises that are devoted solely to the use by them of a private dwelling liquor for their own use and consumption and that of their family but not otherwise. Any liquor that is maintained in a place which is not exclusively the residence, although the parties may live upon the premises, if it is devoted partly to use as a saloon or soft drink place, or a hotel or any other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law.”

In this portion of the charge the Court presumed to pass upon the question of fact that plaintiff in error kept or maintained intoxicating liquor on the premises, notwithstanding there was *no* evidence of that fact.

This charge was further erroneous, in that it informed the jury that no liquor was permitted to be kept in a hotel, even though *some* portion thereof was devoted *entirely* to residence purposes.

c. The Court in its charge instructed the jury

that the *prima facie* presumption that when liquor is kept in a place unauthorized under the law, it is so kept for sale, cannot be rebutted by evidence, though it may be true, showing that it was kept, not for *sale*, but for some other unlawful purpose. The portion of the charge referred to reads (pp. 18 and 19, record) :

“It is true as the United States Attorney suggests that it is not necessary under this Act that it be shown that any positive sale or dispensing of liquor was going on at the time provided it is shown that there was liquor maintained on the premises. Section 33 of the Act provides: ‘After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title.’ In other words where liquor is found upon premises that are not of the character of those described in the Act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is *prima facie* evidence that it was there for an illegal purpose under the law. As I say the only place where liquor is permitted to be maintained under the Prohibition Act is one’s private residence, premises devoted solely to the occupation and use as such. It is true that where one lives at a hotel or lives

in a flat, or lives in apartments, exclusively devoted to the purposes of residence he may keep and maintain liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going elsewhere and enjoy it with his meals. For the purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this Act so that the law shall not be subject to any pretense that it is being used under such circumstances solely for the use of the parties. If the defendant Traversi is testifying truthfully that he was taking this with him to some place where he was going to have his lunch he would be violating the law because if he maintained it in a room occupied by him as a private residence he would be entitled to have it there and serve his family there, but not permitted to take it off the premises."

This portion of the charge is also error, because it informed the jury that no person is permitted, under the law, to remove intoxicating liquor from one place where he has a right to keep it to some other place where he may lawfully consume it.

d. The Court erred in charging the jury they might conclude, from the fact that liquor was brought into a place, illegally, at one time, it was also so brought there on other occasions. The portion of the charge here referred to states (pp. 37-38, record) :

“You are entitled to draw reasonable deduction from the evidence that is before you and determine whether if liquor was brought there at one time in an illegal way it was not brought there for the same purpose on other occasions. It is a question of fact for you.”

THE SECOND COUNT OF THE INFORMATION SHOWS THAT PLAINTIFF IN ERROR HAS VIOLATED NO LAW, AND THAT HE WAS GUILTY OF NO OFFENSE, SO FAR AS THAT COUNT IS CONCERNED; AND SAID SECOND COUNT IS INSUFFICIENT TO SUSTAIN A CONVICTION.

This count reads:

“That G. Traversi and Pete Taro” * * * did then and there wilfully and unlawfully *possess* certain intoxicating liquor, to-wit: 1 Qt. Bottle 1/3 full red wine then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.”

“That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3, Title II of the Act of Congress of October 28, 1919, to-wit, the National Prohibition Act” (p. 4, record).

This count charges plaintiff in error with the *mere possession* of certain intoxicating liquor, and not that he possessed the same for the purpose of its being sold, etc., nor that such liquor was intended for use in violating Title II of the National Prohibition Act, the only offenses relating to the “pos-

session" of intoxicating liquor Congress is authorized to prescribe.

Eighteenth Amendment to the Constitution.

Section 33, Title II, National Prohibition Act,
41 Stat. 305.

United States v. Dowling, 278 Fed. 630, pp. 637-640.

Street v. Lincoln Safe Deposit Co., 254 U. S. 88,
pp. 92, 94, 95; 65 L. Ed. 151.

That this is the construction that should be placed upon the National Prohibition Act is apparent; for the reason that the police power of Congress to legislate regarding intoxicating liquor, coming, as it does, from the Eighteenth Amendment, is limited to enforcing the prohibition of "the *manufacture, sale or transportation* of intoxicating liquors within, the *importation* thereof into, or the *exportation* thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

Tenth Amendment to the Constitution.

Slaughter House Cases, 16 Wall 36; 21 L. Ed. 394, p. 404.

U. S. v. DeWitt, 9 Wall. 41; 19 L. Ed. 593.

Hamner v. Dagenhart, 247 U. S. 251, p. 275; 62 L. Ed. 1101, pp. 1106 and 1107.

As was said by Mr. Justice Clarke, in *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88 (pp. 90 and 91): "Title II of the Volstead Act was passed un-

der the grant of power to enforce the 1st Section of the 18th Amendment to the Constitution of the United States, which prohibits the manufacture, sale, and transportation of intoxicating liquors for beverage purposes."

While in the ^{Store} ~~Clarke~~ case the only question involved was the right to *store* liquors which were not being kept for the purpose of sale, barter, exchange, furnishing or otherwise disposed of in violation of the provisions of the title (namely Title II); yet the language of the opinion in holding that the inhibition against "keeping" intoxicating liquor found in Section 21 of Title II of the Act, implied keeping "for sale or barter, or other commercial purpose" (see p. 92), is equally applicable to the prohibition against the "possession" of such liquor mentioned in Section 3 of the same title, and the possession therein referred to means a possession thereof "for the purpose of its being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions" of such title, as provided in Section 33 of Title II, quoted in the opinion (p. 94).

In his concurring opinion (p. 95), Mr. Justice McReynolds is emphatic in his statement that under the 18th Amendment, it was only the manufacture, sale and transportation that was prohibited—not personal use.

In *United States v. Dowling*, 278 Fed. 630, the District Court for the Southern District of Florida passes upon this identical question; and while it is not contended that the decision is binding upon this

Court, the reasoning of the District Judge is persuasive, and worthy of consideration.

After pointing out that the alleged offense charged—as here—is the bare possession of intoxicating liquors, and that no accompanying facts are alleged to show that such possession was unlawful either on account of the time, place or purpose of the possession, and quoting and commenting upon the amendment in question to the Constitution, Judge Clayton says, (p. 637):

“However, I think the Congress has the power to prohibit the possession of intoxicating liquors, if the possession is inhibited for the purpose of rendering effective the expressed prohibitions of the amendment; but the Congress cannot do this for the purpose of adding a new prohibited act to the fundamental law. It is clear that the Congress is without authority to make the mere possession of intoxicating liquors—possession stripped of every other fact or incident—a crime. The amendment neither by expression nor implication denounces the simple possession of intoxicating liquors. The possession is lawful unless it be coupled with the illegal ‘manufacture’ or ‘sale’ or ‘transportation’ or ‘importation’ or ‘exportation.’ ”

On p. 638 the opinion continues:

“In the instant case, the liquors may have been in existence before the adoption of the amendment, and for aught that appears from the indictment they may have been in existence at such prior time. The offense which the defendants are conspiring to commit is the possession of liquors disconnected with any

facts charging the manufacture, sale, transportation, importation, or exportation in violation of the law, or any intention or purpose to possess or use them in violation of the law. The indictment, in that it charges nothing more than the bare possession of intoxicating liquor, is defective.”

The opinion then quotes Section 33, and then says:

“This section does several things. It prescribes a rule of evidence where possession of the liquor is shown on the trial; it requires every personally legally permitted to have liquor to report to the commissioner, etc., and then proceeds to say:

‘But it shall not be unlawful to possess liquors in one’s private dwelling * * * for the personal consumption of the owner thereof and his family * * * and of his bona fide guests when entertained by him therein.’

—and puts the burden of proving that such liquors were lawfully acquired, possessed and used on the possessor. But the act cannot be said to denounce possession, isolated from all other facts or circumstances as an offense. And if it did it would exceed the power conferred upon the Congress by the Eighteenth Amendment, and to that extent would be void.”

The affidavit of D. D. Simpson, upon which the information was based (pp. 5 and 6, record) does not in any way strengthen this charge in the information. The only direct statement of any *fact* regarding the *possession* of intoxicating liquor by the defendants mentioned therein is that on the day and at the place referred to in the information G.

Traversi and Pete Taro "did then and there possess certain intoxicating liquor, to-wit: 1 Qt. bottle $\frac{1}{3}$ full of red wine then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes" (p. 6, record).

It is true that this affidavit further states:

"That the keeping for sale of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to-wit, the 'National Prohibition Act.' "

This statement is but a mere *conclusion* of the affiant, and not a direct affirmation of any fact. See *United States v. Hess*, 124 U. S. 483; 31 L. Ed. 124, where the Court, through Mr. Justice Field says: "The charge must be made directly, not inferentially or by way of recital." Besides which, the only statement in the affidavit to which this clause *could* refer is that found in the first portion thereof, that defendants "did then and there *keep for sale* on said premises certain intoxicating liquor," etc. (p. 5, record).

It follows, therefore, that the second count of the information does not charge plaintiff in error with any offense whatever, known to the law, nor does it show that he had violated the law, or that he was guilty of any offense, and that such second count is insufficient to sustain a conviction.

Plaintiff in error is familiar with the decision of this Court in *Page v. United States*, 278 Fed. 41, and that of the Circuit Court of Appeals for the Sixth

Circuit, in *Rose v. United States*, 274 Fed. 245; and respectfully submits that, inasmuch as Federal criminal statutes, especially those that create a new offense, must be *strictly* construed, so long as such a construction does not frustrate the *obvious* legislative intent, as held in *St. Louis Merchants' Bridge Terminal Co. v. United States*, 188 Fed. 191, and *United States v. Corbett*, 215 U. S. 233, and seeing that the intention of Congress in enacting the National Prohibition Act was to carry out the mandates of the Eighteenth Amendment for its enforcement, and also that only *such* possession as is not authorized by the Act is thereby made unlawful, an information charging a defendant with the unlawful possession of intoxicating liquor should, *at least* inform such defendant wherein such possession was unlawful, so that he might be appraised with all necessary certainty of the crime with which he stands accused and of the nature and cause of the accusation, and also to inform the Court that the acts charged will support a conviction.

Sixth Amendment to the Constitution.

United States v. Cruikshank, 92 U. S. 542; 23 L. Ed. 588, 593, 594.

United States v. Carney, 228 Fed. 163, 165, 166.

Keck v. United States, 172 U. S. 434, 437; 43 L. Ed. 505, 507.

United States v. Boasberg, 283 Fed. 305, 312.

It may be contended by the United States Attorney, that inasmuch as plaintiff in error neither demurred to the information, nor made a motion in

arrest of judgment, he will not be permitted, in this proceeding, to raise the question of the sufficiency of the information to state a public offense.

Plaintiff in error has endeavored to demonstrate not so much that the second count of the information fails to state any offense, but that it states no offense whatever, and shown *affirmatively* that he has committed none, and that he has violated no law; for *possession* of intoxicating liquor is permitted to every person, and all persons are presumed to be innocent of crime.

As neither the National Prohibition Act, nor any other federal statute makes the mere "possession" of intoxicating liquor an offense, there is no penalty provided by law for the naked possession by any person of such liquor; and when plaintiff in error was sentenced by the District Court upon a verdict of guilty on the second count of the information, that Court was without jurisdiction to render judgment against him, so far as the second count was concerned, for the reason that the acts set forth in such second count do not constitute an offense against the National Prohibition Act, or against any other federal statute, and for the further reason that the law provides no punishment whatever for the doing of the acts therein set forth; and that, therefore, that portion of the judgment—whatever it might have been—was void upon its face, and could have been attacked collaterally upon *habeas corpus*,

Mackey v. Miller, 126 Fed. 161, p. 163,

and, therefore, also directly, by writ of error.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION UPON THE FIRST COUNT OF THE INFORMATION.

Plaintiff in error is charged in this count with maintaining a common nuisance at 115 I Street, Sacramento, California, in that he did keep for sale on said premises certain intoxicating liquor, namely, 1 Qt. bottle $1/3$ full of red wine containing one-half per cent or more of alcohol by volume, which was then and there fit for beverage purposes (p. 5, record).

While the language of this count is "keep for sale on the premises", and not "keep on the premises for sale", there can be no question but what it must be construed to mean "keep on the premises" namely 115 I Street, Sacramento, California, for sale; for Section 21 of Title II of the National Prohibition Act, defining a common nuisance thereunder, reads, "Any room, house, building," etc., "where intoxicating liquor is kept" * * * "is hereby declared to be a common nuisance, and the Supreme Court, in *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, has construed the word "kept" as used in that section, to mean "kept for sale or barter, or other commercial purpose. So it became incumbent upon the prosecution, before plaintiff in error could be convicted upon this count, to prove that said plaintiff, at the time stated therein *kept* such liquor *on the premises* at 115 I Street, for sale. The evidence discloses that neither at the time mentioned, nor at any other time, did plaintiff in error *keep* said or any liquor *on said premises*, either for sale, or otherwise.

The work "keep," when used as a verb, is synonymous with "maintain," and contains the idea of continuity and permanency.

Century Dictionary.

New Standard Dictionary.

Encyclopaedic Dictionary.

United States v. Smith, 4 Cranch C. C. 659; 27 Fed. Cas. 1155.

Clute v. Clintonville, 144 Wis. 638; 129 N. W. 661, p. 663.

London & Lancashire Fire Insurance Co. v. Fisher, 92 Fed. 500.

State v. Lawson, 239 Mo. 591; 145 S. W. 92 p. 96.

Commonwealth v. Patterson, 138 Mass. 498 p. 500.

United States v. Dowling, 278 Fed, 630 p. 643.

In defining the word "keep" as used in a statute prohibiting the "keeping" of a common gaming table, Judge Cranch, of the Circuit Court of the District of Columbia, (*United States v. Smith, supra*) says:

"Where shall we look for authorities to settle the meaning of this most significant term, upon the true construction of which depends the fate of several unhappy beings now in jail? Shall we seek them in common usage? That is in favor of the meaning I contend for. Shall we go to dictionaries, to the best expositions of the term keeping, by the best lexicographers? They support my definition. Shall we seek for illustrations from parallel and correspond-

ing words in other languages? They sanction the definition I have given it, namely: take the Latin language, the verb 'sustenare' is the nearest, nay the true corresponding word in that language to the word 'keep.' This word is translated by Ainsworth, the highest authority, to 'sustain' or 'maintain' and what English scholar will give a meaning to those words implying only a moment's or even an hour's duration." * * * * *

"To return to the word 'keeping.' If the word implies exclusively, when unattended with other restraining adjuncts or explanatory words, what I have stated above, if it was never known, in common use to have any other meaning, nor according to the expositions of the best dictionaries, illustrated by parallel and corresponding words in other languages, no other meaning can be ascribed to it, shall we force it to a meaning thus denied it by common use, and such authorities, in order to convict the prisoner, and send him to the wretched confinement of the penitentiary, because, to our more cultivated minds and more improved moral sense, he has indulged in practices which shock our feelings?" * * * * * "But the law says, whoever shall 'keep a faro bank or gaming table,' without any words of limitation. Now why should we be thus astute in seeking to bring the traverser within the formidable penalty of the statute, by resorting to an unusual, forced and unauthorized construction of a single term or expression, on the true import of which his fate hangs?"

Among the definitions of the verb keep, given by lexicographers, are the following:

“To have habitually in stock or for sale.”

“To maintain, carry on, as the establishment of a business, etc., conduct, manage, as to keep shop.”

“To maintain habitually.”

Century Dictionary, paragraphs 8, 11, 19.

“To have a supply of for sale, to be in the habit of selling, as to keep butter, etc.”

Encyclopaedic Dictionary.

Synonyms: “A person keeps a shop * * keeps or carries a certain line of goods.”

New Standard Dictionary.

In *London & Lancashire Fire Insurance Co. v. Fisher*, 92 Fed. 500, Judge Taft held that the carrying of gasoline through a store, in which goods were stored, for immediate delivery to customers, did not violate an insurance policy on such goods, which policy provided it should be void if gasoline “be kept, used or allowed” on the premises; the contention being that the insured, under these facts “allowed” gasoline on the premises. While it was admitted that the carrying of gasoline through the store, without leaving it there permanently, did not come within the adjudicated meaning of the term “kept,” the reasoning of Judge Taft clearly indicates that if such act was not “allowing” the gasoline on the premises, it could not have amounted to keeping it there.

In *United States v. Dowling*, 278 Fed. 630, defendant was charged with maintaining a common nuisance under the National Prohibition Act, the lan-

guage of the indictment being, (p. 641) "Defendants" * * "did keep—cases of intoxicating liquor on board a certain boat."

The Court, in passing upon a demurrer to this count of the indictment, intimated, and properly so, that it was insufficient, in that it did not charge that the liquors were kept for sale, discusses the meaning of the word "keep" as used in Section 21, Title II of the Act, saying, (p. 643):

"But in addition to the foregoing, there is no showing that the intoxicating liquors were kept in a manner violative of the Act, or in such manner as to come within the definition of a nuisance as contained in Section 21, but the allegations which should be present to show 'maintenance' were also wanting. The word 'maintenance' implies continuance, and the Act implies it from the use of the word 'keep.' The meaning of these words was passed upon in the case of *Commonwealth v. Patterson*, 138 Mass. 498, 500, where the following language was used with reference to a liquor nuisance:

'The proprietor of a building cannot be said to 'keep or maintain' a common nuisance, within the meaning of Pub. St. C. 101, 56, making a building used for the sale of intoxicating liquors a nuisance, on the strength of a single casual sale, made without premeditation in the course of a lawful business. The words 'keep or maintain' import a certain degree of permanence.'

No facts are alleged in these counts of the indictment showing, or tending to show, a keeping or maintaining, or any other status from which permanence could be inferred."

Tested not only by the foregoing definitions and applications by the Courts of the word, but also by the common acceptance of its meaning and significance, there is *absolutely no* evidence in the record that plaintiff at any time "kept" any intoxicating liquor whatever on the premises 115 I Street, either for sale, or otherwise, and no evidence that such premises ever were a common nuisance. Indeed this Court has intimated, in *Page v. United States*, 278 Fed. 41, on p. 45, that a single unlawful act of possession is insufficient to constitute the building in which it is possessed, a common nuisance.

The evidence, as heretofore set out, merely shows that plaintiff in error entered the bar room of the hotel through a door "at the end of the bar next to the street," as testified to by Greer (p. 27), "that leads into a hallway and then upstairs," as described by DeSpain (p. 25, record) with a bottle of wine in his hands, which DeSpain took from him (testimony of DeSpain, p. 25, and of Greer, p. 27, record).

Consequently the wine in question was never, even for an instant, stationary on the premises, and could not have been 'kept' there by plaintiff in error; and said premises, so far as the testimony shows, was at no time a common nuisance.

This is reversible error, although no request was made for a directed verdict.

Wiborg v. United States, 163 U. S. 632, p. 658;
41 L. Ed. 298.

Felder v. United States, 227 Fed. 832, 833.

THE COURT ERRED TO THE PREJUDICE OF PLAINTIFF
IN ERROR IN ITS CHARGE AND INSTRUCTIONS TO THE
JURY.

The Court charged the jury as follows, (pp. 32-33,
record) :

“The first count of this information charges the defendants with maintaining a common nuisance, and a nuisance under this Act is defined thus, ‘Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, *kept* or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance.’ That is, it simply means that where liquor is kept in a building or a structure where it is not permitted to be kept under the Prohibition Act the maintaining of it is deemed to be for *illicit* and *illegal* purposes and it constitutes what is denominated a common nuisance. Now under the National Prohibition Act one may keep liquor in their private dwelling on premises that are devoted solely to the use by them of a private dwelling, liquor for their own use and consumption and that of their family but not otherwise. Any liquor that is maintained in a place which is not *exclusively* the

residence, although the parties may live on the premises, if it is devoted partly to use as a saloon or soft drink place, or a *hotel* or any other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law. Now that is the charge in the first count here.”

This instruction is error, in that

a. It omitted in its definition of the offense of maintaining a common nuisance under the Act, one of the necessary ingredients, namely, that in order to constitute a building a common nuisance, intoxicating liquor must not only be *kept* therein, but also that such liquor must be kept for *sale* or *barter*, or other *commercial purposes*.

Sections 21 and 33, Title II, National Prohibition Act.

Street v. Lincoln Safe Deposit Co., 254 U. S. 88, p. 92.

b. It omitted the further condition that such liquor must be fit for use *for beverage purposes*.

Section 1, Title II, National Prohibition Act.

c. It instructed the jury that the first count of the information charged plaintiff in error with maintaining a common nuisance by keeping intoxicating liquor in a building where it is not permitted to be kept, and omitted material elements of such count, namely, that such liquor was kept *for sale* on such

premises (p. 3, record), and that it was *fit for use for beverage purposes* (p. 3, record).

d. It instructed the jury that where liquor is kept in a building or structure where it is not permitted to be kept under the Prohibition Act, the maintaining of it is deemed to be for *illicit* and *illegal* purposes and it constitutes what is denominated a common nuisance; whereas the first count charged plaintiff in error with keeping intoxicating liquor on said premises *for sale*, and for *no other* illicit or illegal purpose (p. 3, record); and the jury was not at liberty, under the information, to find that it was kept for any other purpose prohibited by the Act, nor to presume that it was kept for any purpose, other than for *sale*. The presumption that where liquor is possessed by any person not legally permitted to possess it, such liquor is kept for the purpose of being sold, is a rule of *evidence*, and not of *pleading*.

e. The Court, in giving said charge, instructed the jury that intoxicating liquor was *maintained* by plaintiff on said premises, and presumed to pass upon the question of fact that plaintiff in error *maintained* — in other words, *kept* — intoxicating liquor upon such premises, and there is no evidence that plaintiff in error, at any time, either maintained or kept intoxicating liquor thereon.

f. The Court in giving said charge, instructed the jury (p. 33), that any liquor that is maintained in a place which is not *exclusively* the residence, al-

though the parties may live upon the premises, if it is devoted *partly* to use as a saloon or soft drink place, or a hotel or any other than exclusively as a private dwelling, the maintenance of liquor there is not permitted under the law; such instruction is contrary to law.

Section 25, Article II of the National Prohibition Act provides:

“The term ‘private dwelling’ shall be construed to include the *room* or *rooms* occupied not transiently but *solely as a residence* in an apartment house, *hotel*, or boarding house.”

The Court further charged the jury (pp. 35-37):

“It is true, as the United States Attorney suggests, that it is not necessary under this Act that it be shown that any positive sale or dispensation of liquor was going on at the time, provided it is shown that there was liquor maintained on the premises. Section 33 of the Act provides: ‘After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title.’ In other words, where liquor is found upon premises that are not of the character of those described in the Act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is *prima facie* evidence that it was there for an illegal purpose under the law. It is true that where one lives at a hotel or lives in a flat, or lives

in apartments, exclusively devoted to the purposes of residence he may keep and maintain liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going somewhere else and enjoy it with his meals. The purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this Act so that the law shall not be subject to any pretense that it is being used under such circumstances solely for the use of the parties. If the defendant Traversi is testifying truthfully that he was taking this with him to some place where he was going to have his lunch he would be violating the law because if he maintained it in his private residence he would be entitled to have it there and serve his family there, but not permitted to take it off those premises."

This portion of the charge is error, in that: It instructed the jury that the rule found in Section 33 of the Act, that the possession of liquors by a person not legally permitted to possess liquor, is *prima facie* evidence that such liquor is kept for the purpose of being sold, is *conclusive* evidence of such fact, even though the evidence should show that such liquor was *not* kept for such purpose, but was to be used for some *other* unlawful purpose, not that of sale. It must be borne in mind that the *only* unlawful purpose plaintiff in error was charged, under the first count, with keeping the liquor in question, was that it was so kept by him *for sale*. (p. 3 record.)

A presumption of the existence of a fact cannot in itself possess probative weight, but merely necessitates evidence to meet the *prima facie* case which it creates; that when the function of a presumption of law sustaining the burden of evidence is ended by the introduction of rebutting testimony the presumption of law disappears, leaving in evidence the basic fact, which still retains its probative force and is capable of being weighed against other facts, and that a presumption of *fact* becomes inoperative when the actual facts are disclosed.

22 *C. J.* 156 Sec. 88.

2 *Chamberlaine on Evidence*, Sec. 1085, p. 1328.

4 *Wigmore on Evidence*, Sec 2491, p. 3534.

United States v. Ross, 92 U. S. 281, 23 L. Ed. 707, 709.

Lawson v. Mobile Electric Co., 204 Ala. 318, 85 So. 257, 259, 260.

State v. Adams, 22 Idaho 45, 126 Pac. 401, 402.

State v. Wilkerson, 164 N. C. 431, 79 S. E. 888, 890-892.

In discussing the effect of a statute that made the possession of a certain quantity of spiritous liquor *prima facie* evidence that it is held for the purpose of sale, the Supreme Court of North Carolina, in *State v. Wilkerson*, *supra*, (79 S. E. p. 890) says:

“While the bare possession of so much may, in itself and as a fact, be innocent, it is yet made *prima facie* evidence of guilt under the

statute. * * * But it is only evidence, and while it has the added force or weight of being *prima facie*, the latter means no more than it is sufficient for the jury to convict upon it alone and unsupported, if no other proof is offered, but upon the whole evidence, whether consisting of the mere fact of possession, or of additional facts, the jury are not bound to convict but simply may do so if they find beyond a reasonable doubt, or are fully satisfied that the defendant is guilty. *Prima facie* means at first; on the first appearance; on the face of it; so far as can be judged by the first disclosures, presumably. * * * The jury are no more required to convict upon a *prima facie* case than they are to acquit because of the presumption of innocence. They must judge themselves as to the force of the testimony and its sufficiency to produce in their minds a conviction of guilt."

In the same case (p. 891) the Court continues:

"It may therefore be taken as settled in this Court, at least, and we believe the same may be said of most, if not all, of the courts, that *prima facie* or presumptive evidence does not of itself establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of the issue, which always remains with him who holds the affirmative. It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfied the jury. The other party may be required to

offer some evidence in order to prevent an adverse verdict or to take the chances of losing the issue if he does not, but it does not conclude him or forestall the verdict. He may offer evidence, if he chooses, or may rely alone upon the facts raising the prima facie case against him, and he has the right to have it all considered by the jury; they giving such weight to the presumptive evidence as they may think it should have under the circumstances. The defendant is not required to take the laboring oar and to overcome the case of the plaintiff by a preponderance of evidence is what we said in *Winslow v. Hardwood Co.*, *supra*, and substantially the same thing was said in the other cases we have cited. This is undoubtedly the rule in civil cases, and it applies with greater force to criminal cases where the defendant has the benefit of the doctrines of reasonable doubt and the presumption of innocence. How can we say that prima facie evidence, or that which is apparently sufficient, excludes all reasonable doubt of guilt by its own force and overcomes the presumption of innocence? The bare statement of the proposition is sufficient to show its fallacy. It would destroy the presumption of innocence and take away the protection of the other rule as to reasonable doubt. The presumption of innocence attends the accused throughout the trial and has relation to every essential fact that must be established in order to estab-

lish his guilt beyond a reasonable doubt. *Kirby v. U. S.*, 174, U. S. 47, 43 L. Ed. 890. He is not required to show his innocence; the State must prove his guilt. No valid conviction can be had in law which is based solely upon prima facie evidence as conclusive and foreclosing the verdict, or which even casts upon the defendant the burden of showing his innocence by the greater weight of the evidence. We know of no such rule, and it finds no warrant in the language of the statute. The decisions are all the other way when rightly interpreted."

In *State v. Adams*, 22 Idaho, 45, 126 Pac. 401, the judgment of conviction was reversed by reason of the giving an erroneous instruction.

The Statute of Idaho provided that the finding of intoxicating liquors in the possession of a person at a place other than a private dwelling house shall be prima facie evidence that such intoxicating liquors are kept for sale. The trial judge instructed the jury that the statute provided that finding intoxicating liquors in the possession of a person at a place other than a private dwelling house shall be deemed sufficient to authorize a verdict of conviction for the offense, in the absence of evidence showing that such liquors were in the possession of the person for a lawful purpose; and further instructed the jury as follows:

"If, therefore, you should find from the evidence in this case, beyond a reasonable doubt, that intoxicating liquors were found at the place

of business of the above named defendant as alleged in the complaint, the burden of proof is on the defendant to prove that such intoxicating liquors were kept and used for an unlawful purpose, and in the absence of any such proof on the part of the defendant showing that such intoxicating liquor, if any liquor was found at his place of business, was kept and used for an unlawful purpose, then and in that event you should find the defendant guilty."

In holding the giving of this last portion of the instruction reversible error, the Court said:

"It is contended by the appellant that this instruction was clearly erroneous, and invaded the province of the jury, in telling them it was their duty to find the defendant guilty if they concluded beyond a reasonable doubt that intoxicating liquors were found at the place of business of the defendant as alleged in the information. This instruction was clearly erroneous. Where a statute provides that, upon a certain fact being shown, certain other presumptions of law arise, or where, as in this case, where one fact is shown, namely, the possession of the intoxicating liquors, that such fact is 'prima facie evidence that such intoxicating liquors are kept for sale,' etc., the statute means that such prima facie presumption or prima facie evidence is sufficient to go to a jury to prove such fact, and that it will be sufficient to support a verdict. It does not mean, however, and so far

as we are aware, has never been held by any of the courts, that it is the duty of a jury to take such *prima facie* evidence or presumption as conclusive, and that they must render a verdict accordingly. Such statutes are enacted for the purpose of shifting the burden of proof; but if the adverse party does not see fit or deem it necessary to rebut the presumption in any given case, he may have the matter submitted to the jury, and they must be given the right and privilege of exercising their judgment as jurors upon the weight, sufficiency, and credibility of the evidence and the attendant circumstances of the case. A court is not justified in telling the jury it is their duty to convict simply because a *prima facie* presumption arises or that the proof of one fact is made by the statute *prima facie* evidence of the existence of another essential fact."

Said portion of the charge is also erroneous in that the jury was thereby instructed that even though "if the defendant Traversi is testifying *truthfully* that he was *taking* this with him to some *place where he was going to have his lunch* he would be *violating the law*."

By this portion of the charge, the Court instructed the jury, at least inferentially, that so far as the issue as to whether or not plaintiff in error kept the intoxicating liquor on the premises, *for sale*, was concerned he was neither entitled to the doctrine of the

presumption of innocence, nor to that of reasonable doubt.

A man *lawfully* in the possession of liquor, which he keeps in a place permitted under the law, has the *absolute right* to remove such liquor from *that* place to some *other* place at which the law gives him the right to consume it.

Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 93; 65 L. Ed. p. 154.

In the case last cited, the Supreme Court held that when a person has liquor lawfully stored in a place over which he has the exclusive control, it is not unlawful for him to transport or remove such liquor to his permanent residence for the purpose of consuming it there.

So, when the plaintiff testified that he was taking the wine to some place to have his lunch, or—as stated by the Court—“to enjoy it with his meal,” the presumption of innocence and the doctrine of reasonable doubt should be invoked in his favor; and he was entitled to have the jury determine, first, whether the liquor was being removed by him from one place where he had the legal right to store it, and secondly, whether it was being taken to another one where, under the law, he had the right to consume it, and when the Court instructed the jury that “the possession” by plaintiff in error of the wine was “not justified” (p. 34, record) and that he “would be violating the law” by taking it to some place where he was going to have his lunch” (p. 36, record), he was deprived of his constitutional rights

to have these facts determined by the jury, and also of his right to have the jury give him the benefits of the presumption of innocence and of the doctrine of reasonable doubt.

The Court also instructed the jury (p. 33, record) :

“The second count is that on the same date the defendants had in their possession the liquor that is charged here as having been taken from the defendant Traversi. This quart of red wine. Now possession, of course, you all understand what that means. It means either having it in your hands, your pockets or *on premises* immediately under your control. That is in law, in your possession and the defendants are charged with having this liquor in their possession and under circumstances which are not warranted under the Act.”

This portion of the charge is also erroneous, for several reasons.

First. It informed the jury that plaintiff in error was charged with the “possession” of the liquor. It is true that such is the nature of the charge in the second count; but when the Court so informed the jury, it virtually said that mere “possession” of intoxicating liquor is an offense under the National Prohibition Act—an incorrect construction of the Act, as has been heretofore demonstrated.

Secondly. It instructed the jury that plaintiff in error had in his possession a *quart* of red wine. This instruction as to the facts is not warranted either by the information nor by the evidence. The charge

THE CONVICTION OF PLAINTIFF IN ERROR UPON BOTH COUNTS OF THE INFORMATION WAS ILLEGAL, FOR THE REASON THAT THEY WERE EACH BASED UPON THE SAME FACTS, EACH CHARGING PLAINTIFF IN ERROR OF AN OFFENSE ARISING OUT OF HIS POSSESSION OF THE SAME LIQUOR AT THE SAME TIME, AND THE COURT HAD NO JURISDICTION TO SENTENCE HIM UPON BOTH.

As already pointed out, the only evidence connecting plaintiff in error with the possession of intoxicating liquor was that on the day mentioned in the information he entered the door with a bottle of wine in his hands. It is this same bottle of wine that he is charged with "keeping on the premises 115 I Street for sale," and also with "possessing" unlawfully; consequently, both counts being based upon the same identical facts, namely the possession of the same Qt. bottle $1/3$ full of the same red wine, a conviction on one count would entitle him to an acquittal on the other, as having been once in jeopardy; and the Court was without jurisdiction to sentence him on both. This is ground for a reversal of the judgment.

Ex parte Nielsen, 118 U. S. 176, 188; 33 L. Ed. 118, 120.

Reynolds v. United States, 280 Fed. 1, 3, 4.

Rossman v. United States, 280 Fed. 950, 953.

The point above urged is also given in the assignment of errors.

THIS COURT MAY AND SHOULD CONSIDER AND CORRECT THE ERRORS PRESENTED HEREIN.

In a criminal case, when the liberty of a defendant

is at stake, the Appellate Court, in the interest of justice, will and should consider plain error *vital* to the defendant, notwithstanding such questions were not presented to the trial Court, by demurrer, motion in arrest of judgment, or exception to the instructions; and even though such questions were not presented to the Appellate Court itself, and such error was not assigned.

Supreme Court rule 35.

Circuit Court of Appeals rule 24, sub. 4.

Wiborg v. United States, 163 U. S. 632, 658;
41 L. Ed. 289, 298, 299.

Weems v. United States, 217 U. S. 349, 362; 54
L. Ed. 793, 796.

Patten v. United States, 42 Appeal D. C. 239,
247.

Humes v. United States, 182 Fed. 485 p. 486.

Pettine v. Territory of New Mexico, 201 Fed.
489, 497.

Felder v. United States, 227 Fed. 832, 833.

McNutt v. United States, 267 Fed. 670, 672.

Rossman v. United States, 280 Fed. 950, 953.

Felder v. United States, 255 Fed. 285, 287.

In *Wiborg v. United States*, 163 U. S. 632, and *Felder v. United States*, 227 Fed. 832, the Court, in each instance, considered and examined the evidence in order to ascertain whether there was any substantial evidence against the defendant, notwithstanding no motion was made on that ground. In doing so, the Supreme Court in the *Wiborg Case*, gave the following reason for so doing:

“No motion or request was made that the jury be instructed to find for the defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the Court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to the defendants, we feel ourselves at liberty to correct it.”

In *Patten v. United States*, the Court of Appeals of the District of Columbia considered the instructions of the lower Court, although no exception had been taken to the charge.

In *Weems v. United States*, the Supreme Court considered questions of law not included in the assignment of errors; and referring to Supreme Court rule 28, invoked by the Assistant Attorney General, said (217 U. S. p. 362):

“But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in *Paraiso v. United States*, but we exercised it in *Wiborg v. United States*, 163 U. S. 632.” * * *

After again referring to its failure to consider the questions involved in *Paraiso v. United States*, the Court continued:

“It may be that we were not sufficiently impressed with the importance of these contentions, or saw in the circumstances of the case no reason to exercise our right of review under rule 35. As we have already said, the rule is not a rigid one, and we have less reluctance to act under it when rights are asserted under it which are of such high character as to find expression and sanction in the Constitution or Bill of Rights.”

In *Rossman v. United States*, 280 Fed. 950, the Circuit Court of Appeals for the Sixth Circuit considered a question, which it deemed vital to the plaintiff in error, that had not been presented by him either in the trial Court or in that Court; and in *McNutt v. United States* 267 Fed. 670, the Circuit Court of Appeals for the Eighth Circuit considered questions raised upon appeal, and reversed the judgment of the lower Court, although at the trial no exceptions were made to any rulings of the Court or any exceptions taken to the testimony. In deciding that the questions should be considered, the Court said (p. 672):

“The United States Attorney meets his” (counsel for plaintiff in error) “brief and argument with the objection that because there were no objections or exceptions to any of the evidence, or any of the rulings of the Court at the trial, there is nothing here for this Court to consider or review and the judgment must be affirmed. Such is undoubtedly the general

“No motion or request was made that the jury be instructed to find for the defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the Court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to the defendants, we feel ourselves at liberty to correct it.”

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rule, but there is an exception to it as firmly established as the rule itself. It is that in criminal cases, where the life or liberty of the citizen is at stake, the Courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request or assignment of error."

It is true that in *Cabiale v. United States*, 276 Fed. 769, this Court refused to consider instructions to which no exceptions had entered; but a reading of the opinion seems to indicate that the objection made in this Court to the charge were merely to some general observations contained therein, which apparently did not effect the fundamental rights of the plaintiff in error therein.

Plaintiff in error, in the light of what was said by the Supreme Court in *Weems v. United States*, submits that the decision of this Court in *Cabiale v. United States*, is not *stare decisis*, and respectfully requests the Court not to treat it as such.

Included in the errors, vital to plaintiff in error, the Court is asked to consider are:

1. There is *no* evidence to sustain a conviction upon the first count, namely, maintaining a common nuisance.

As this is the only count of the information for which a punishment of imprisonment could be

imposed, namely, imprisonment for not more than one year (Section 25 of the Act), the penalty for the unlawful possession of intoxicating liquor, if it be the first offense, being limited to *fine* only (Sec. 29 of the Act), it follows, that if this point be sound, the rights of plaintiff in error would be indeed *vitaly* affected, should the Court refuse to consider the same.

2. The second count of the information states no offense whatever; and the Court has no jurisdiction to render a judgment upon a conviction thereunder.

3. The Court instructed the jury that evidence showing that plaintiff in error did *not* keep the intoxicating liquor for the purpose of sale, *even though true*, would not prevail over the *prima facie* presumption that it was kept for such purpose.

5. The Court instructed the jury that they might *presume* plaintiff in error had committed offenses under the Act other than those set out in the information, notwithstanding no evidence regarding any prior offenses was adduced at the trial.

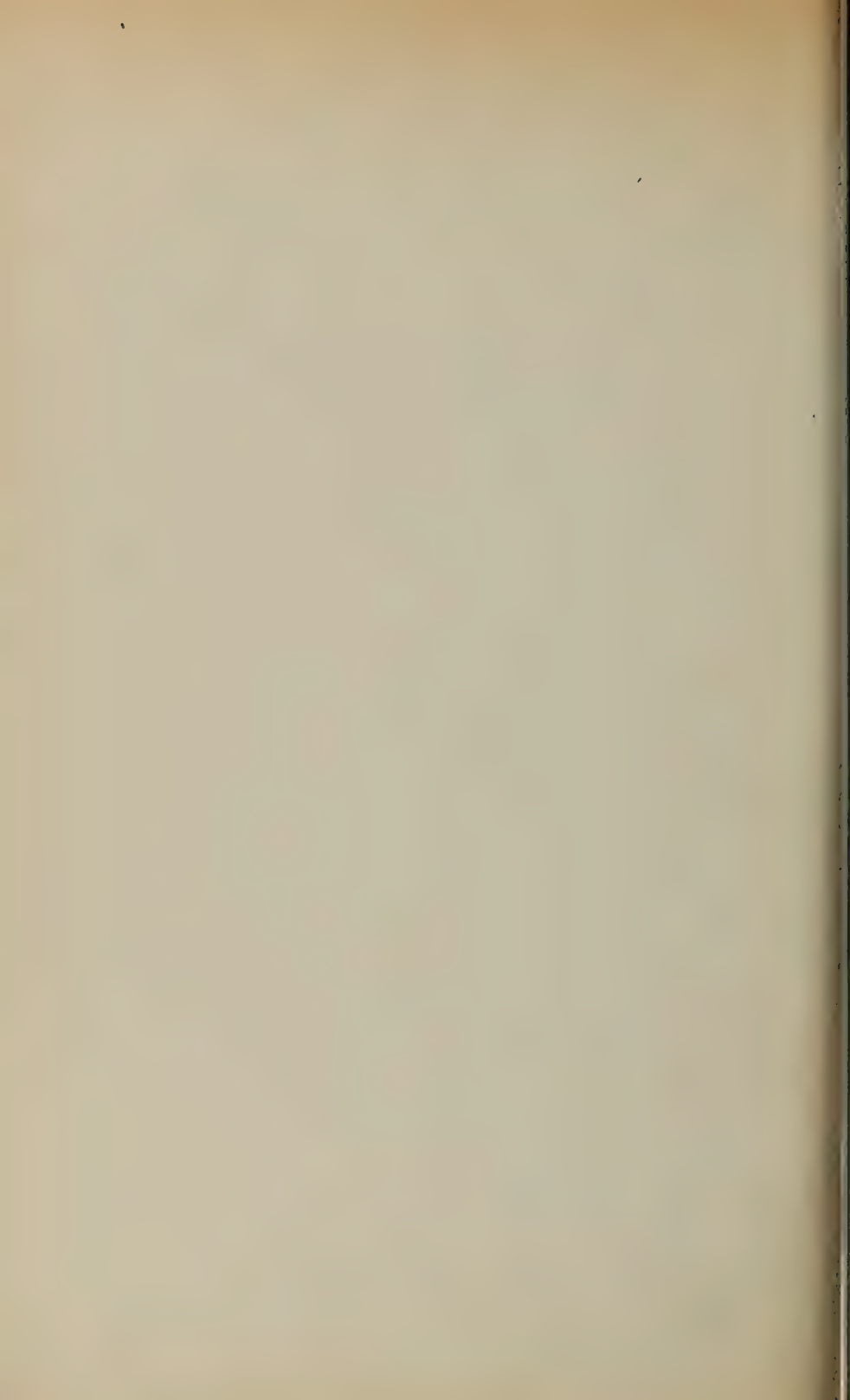
6. Plaintiff in error was convicted and sentenced upon two counts, both of which were based upon the same facts, and the Court had no jurisdiction to sentence him upon both.

The judgment should be reversed, and a new trial granted.

Respectfully submitted,

R. PLATNAUER,

Attorney for Plaintiff in error.



IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

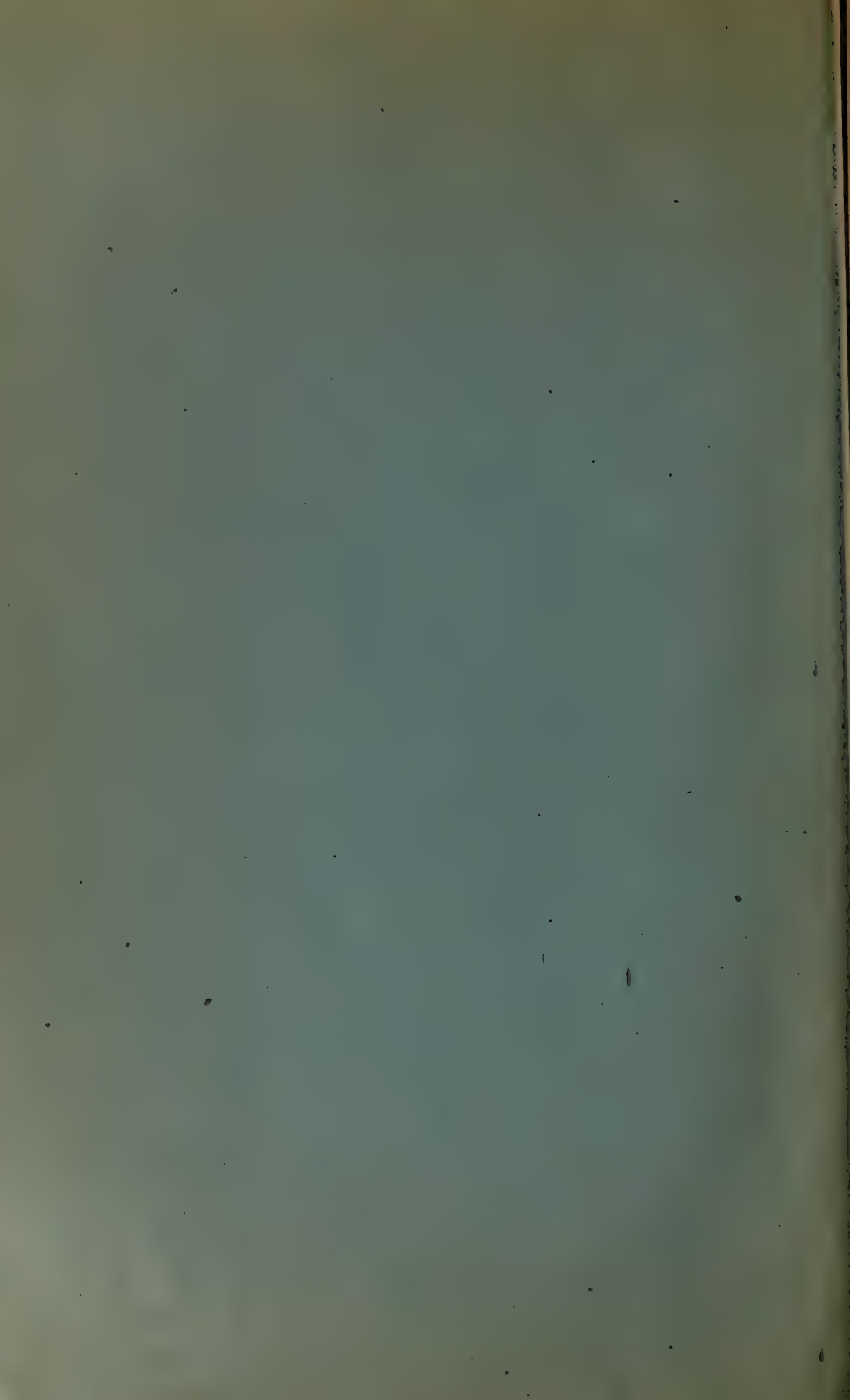
BRIEF FOR DEFENDANT IN ERROR

JOHN T. WILLIAMS,

United States Attorney.

J. J. KENNEDY,

*Asst. United States Attorney, District
for the Southern District of California.*



No. 3955

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United States Circuit Court of Appeals

For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

I

STATEMENT OF THE CASE

This is a writ of error to the District Court of the United States for the Northern District of California, Northern Division, to reverse the sentence of conviction of plaintiff in error upon two counts of an information charging him with violations of the "National Prohibition Act."

In the first count of the information it was charged that plaintiff in error,

“On or about the 5th day of April, 1922, at 115 I St., Sacramento, in the County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this court then and there being, did then and (2) there wilfully and unlawfully maintain a common nuisance in that the said defendants did then and there wilfully and unlawfully keep for sale on the premises 115 I St. aforesaid, certain intoxicating liquor, to wit: 1 qt. bottle one-third full *full* of red wine then and there containing one-half of one percent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act”.

In the second count, the plaintiff in error was charged with the unlawful possession of intoxicating liquor.

The jury having found the defendant guilty on both counts, he was on October 13, 1922, sentenced to pay a fine of \$500 and be imprisoned for three months in the County Jail of Sacramento County, and in the event of default in such payment, that he be imprisoned for the further period of five months, the terms to run consecutively.

At the trial it was shown that DeSpain, a Federal

Prohibition Agent, on April 5, 1922, visited the premises at No. 115 "I" Street in Sacramento; that he saw one Taro back of the bar in his shirt sleeves, serving two patrons with beer. Taro was informed that witness was a Federal Prohibition Agent and directed to step out from behind the bar; he did so and commenced fighting with the agents. At that time plaintiff in error came through a door into the bar room with a bottle of wine in his hands which witness took from him and turned it over to another agent. At the same time there were four or five people in the premises. They were all up to the bar and were drunk, which they displayed by staggering. (Tr. pp. 24 and 25). Witness Greer testified that he was a Federal Prohibition Officer familiar with the premises at No. 115 "I" Street, Sacramento; that it is an old fashioned saloon premises; that he visited the premises on April 5, 1922, with witnesses DeSpain and Agent Rinckel; that he saw Taro waiting on the bar with his coat off; saw a scuffle between Taro and officers; saw plaintiff in error coming through a door at the end of the bar, into behind the bar; that he had a bottle of wine which DeSpain took away from him and that there was red wine in the bottle which contained more than one-half of one per cent or more of alcohol by volume. (Tr. pp. 26 and 27). When defendant in error testified he advanced the claim that he had taken the wine, but that he got it to take lunch and when he reached the door the man grabbed him; that the incident occurred maybe 3:30 or 4:00

o'clock in the afternoon. (Tr. pp. 30 and 31). The plaintiff in error also testified: (Tr. p. 32) "Q. Were you tending bar? A. Yes, when I come at that time; when I came in with the bottle I was tending bar." He further said that one Boizoni was running the bar when he was not there; that at the time Federal Agents came in "I was tending bar myself."

The plaintiff in error now urges before this Court

a. That the second count of the information is insufficient to state an offense or sustain a conviction.

b. That the evidence is insufficient to sustain the conviction on the first count of the information.

c. That court erred to the prejudice of plaintiff in its instructions to the jury and four points in respect to the charge are specified as erroneous.

It may be noted that the point of the insufficiency of the evidence to sustain the conviction on the first count is not raised in the assignment of errors filed by the plaintiff in error.

The plaintiff in error did not object to any testimony or take any exceptions at the time of the trial. He did not move for an instructed verdict at the close of the testimony or at all. He did not take any exceptions to any portion of the Judge's charge. On the contrary, during the charge when the court asked if there was anything else that counsel would like

to ask, Mr. Gray, counsel for plaintiff in error, answered "no." There is a document certified as a bill of exceptions which does not contain any objections or exceptions. The trial court in that behalf added his certificate that "there were no objections or exceptions of any character taken or reserved at the trial either to evidence or the charge of the Court; but I have, at the earnest request of counsel for the defendant consented to certify the record to the end that a review may be had of any question which may be deemed to arise thereon. (Tr. p. 38).

II

ARGUMENT

A. THE SECOND COUNT OF THE INFORMATION WAS NOT INSUFFICIENT. IT PROPERLY CHARGED UNLAWFUL POSSESSION; BUT IT IS NOT MATERIAL TO DETERMINE ITS SUFFICIENCY HERE.

The second count of the information charges unlawful possession of intoxicating liquor according to approved forms. Such possession was prohibited by Section 3 of Title II of the "National Prohibition Act." The punishment therefor was declared in Section 29 of the same Title, and it is provided in Section 32 of the same Title that it shall not be necessary to include in the information any defensive negative averments, but that it shall be sufficient to state that the act complained of was then and

there *prohibited* and *unlawful*. The pleading thus measures up to the requirements of the Statute and is sufficient upon the authority of

YOUNG vs. UNITED STATES, 272 Fed. 967.

The formula made use of by the pleader is authorized by Section 32 of Title II of the Act quoted, and that this provision is entirely valid has been decided in the case of

FYKE vs. UNITED STATES, 254 Fed. 225.

This case was cited with approval upon the same point by this Court in the case of

CABIALE vs. UNITED STATES, 276 Fed. 769.

The Cabiale case is also an authority in support of the pleading here questioned.

But the sufficiency of the second count of the information is not here material. The sentence of imprisonment necessarily rests upon the first count. And the first count is entirely sufficient to sustain the sentence. In fact the plaintiff in error does not question in his assignments of error or in his brief that the first count of the information was sufficient. Since the sentence is sustained by the first count any questions respecting the other count are immaterial.

CLAASEN vs. UNITED STATES, 142 U.S. 140, 35 L. Ed. 966;

DOE vs. UNITED STATES, 253 Fed. 903, 904.

B. THE EVIDENCE WAS AMPLY SUFFICIENT TO JUSTIFY THE VERDICT ON THE FIRST COUNT, BUT THE POINT CANNOT BE RAISED BY THE PLAINTIFF IN ERROR.

The evidence clearly authorized the jury to find that the defendant kept wine for sale at the premises in question. The place was shown to be an old fashioned saloon premises, and was being conducted by plaintiff in error. About the middle of the afternoon of April 5, 1922, three Federal Prohibition Officers entered; they found one man with his coat off behind the bar serving customers; they found three or four people all up to the bar and drunk and staggering. About that time the defendant came through a doorway with the bottle of wine in question in his hands. He admits that when he came in with the bottle he was tending bar. (Tr. p. 32). Greer stated that he saw plaintiff in error "coming through the door at the end of the bar; into behind the bar." (Tr. p. 26). There is thus shown to the jury the not unfamiliar situation of a place fixed up as an "old fashioned saloon" conducted by defendant, customers lined up to the bar and drunk and staggering and being served with something, when the defendant, apparently ignorant of the entry of the officers, came through a door and into behind the bar with supply of intoxicating liquor. These facts are not even denied, although defendant testified. The jury would have stultified themselves had they not found that the liquor in question was

there for the purpose of being sold to the drunken customers. The defendant's argument proceeds entirely upon the proposition that the jury were compelled to accept his statement that instead of intending to sell the liquor, which would have been a crime, he intended to transport it elsewhere to use it for lunch, which would also have been a crime. Considering the situation, and the fact that the alleged going out for lunch was in the middle of the afternoon at a time when he admitted he was tending bar, the jury were not obliged to accept his statement that he was taking the liquor out for his lunch, and did not intend to sell it.

We submit these observations as to the sufficiency of the evidence, but we insist that the question of the sufficiency of the evidence does not arise for the reason that not only was this question not raised by the assignment of errors, but it also appears that defendant did not move for a directed verdict at any time during the trial. In such case he is not entitled to question the sufficiency of the evidence.

CLARK vs. UNITED STATES, 245 Fed. 112.

There can be no reasonable contention that the case presents such threatneed miscarriage of justice that the Court can ignore these salutary rules. Indeed, at the time of the settlement of the bill of exceptions it could not have been known from any record that the question of the sufficiency of the evidence would be urged. It was the duty of the Court to eliminate extraneous matter from the bill,

and while the record in the instant case is probably complete, yet the possibility of abuse would be serious if the Court were as a rule to ignore the salutary doctrine declared in such cases as the Clark case, and review the testimony when up to the time of the settlement of the bill of exceptions there had been no point made as to the sufficiency of the evidence.

The evidence was clearly sufficient, but if any possible strictures could be taken to it, still there is not presented a case of a plain violation of defendant's rights.

C. THE CHARGE OF THE COURT WAS CORRECT. PLAINTIFF IN ERROR DID NOT TAKE ANY EXCEPTIONS THERETO, NOR DID HE REQUEST ANY FULLER CHARGE.

Although plaintiff in error did not except to the charge of the Court, nor did he request any instructions whatever upon collateral points or at all, and his counsel affirmatively declared that he had nothing that he cared to ask, (Tr. p. 35), certain strictures are now taken to a portion of the charge.

At the beginning of the charge the Court properly stated to the jury that the first count of the information charged defendants with maintaining a common nuisance, and the Court thereupon declared that a nuisance, under the Act, is defined thus:

“An room, house, building, boat, vehicle, structure, or place where intoxicating liquor is

manufactured, sold, *kept* or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance."

The quotation is the exact phraseology of Section 21 of Title II of the "National Prohibition Act" in which a nuisance is defined. We are unable to understand how any possible objection can be taken to the very language of the Section under which plaintiff in error was prosecuted, or why it could have been improper in any event for the Court to declare to the jury the language of the Section in question. Indeed, the very authority cited by counsel in support of his objection is this very section. He claims, however, that the liquor must not only be kept therein but it must be kept "for sale or barter or other commercial purposes," but the provision of the law is otherwise. It is said to be unlawful to keep the liquor "in violation of this Title." If there could be no violation of the Title other than keeping it for commercial purposes, the phraseology would be equivalent and either phrase could be indifferently used. It is said also that the liquor must be fit for use for beverage purposes, but the Section uses the words "intoxicating liquor" and counsel did not request any further elucidation of the phrase.

There is absolutely nothing in the language complained of which supports the further objection of counsel that the Court instructed the jury that in-

toxicating liquor was *maintained* on the premises or whereby the Court undertook to pass upon any question of fact. Indeed the Court carefully told the jury that questions of fact were solely within their competence.

Another objection to the charge urged by counsel on page 29 of his brief seems to be that in stating to the jury the rule found in Section 33 of the Act, providing that possession of liquor by a person not legally permitted to possess it is *prima facie* evidence, etc., the Court in fact told the jury that it was conclusive evidence of such fact, but a mere reading of the language used by the Court shows that this objection is unfounded. The Court nowhere made use of the word "conclusive," nor did it in any manner use any language having any such effect. It properly referred to the Section of the Act and quoted it literally, thereby telling the jury that in a certain event certain things would be *prima facie* evidence. It was not error to quote the very language of the Act which provided a rule of evidence for the consideration of the very type of case being tried; the quotation was accurate and no further instruction was requested by defendant, nor was it improper to declare to the jury that it would have been a violation of the law on the part of Traversi if he was doing, as he claimed, that is, taking the liquor out to have his lunch. The government claimed that he had no such purpose, and it was proper for the jury to consider in solving the issue

that such purpose would have been a violation of the law.

Further objection is made to the instruction of the Court regarding the second count as to what amounts to possession. We are really unable to understand how the language complained of is in any respect erroneous, although as we have stated before, the second count may be eliminated from consideration.

We have thus referred to the charge of the Court with the design of showing that it was correct, but we, nevertheless invoke the well established rule of law that the Court will not consider objections to the charge of the Court where the charge is not excepted to.

We call the attention of the Court to the observations of the Supreme Court of the United States on this question in the case of

ALLIS vs. UNITED STATES, 155 U. S.

117, 123; 39 L. Ed. 91, 93;

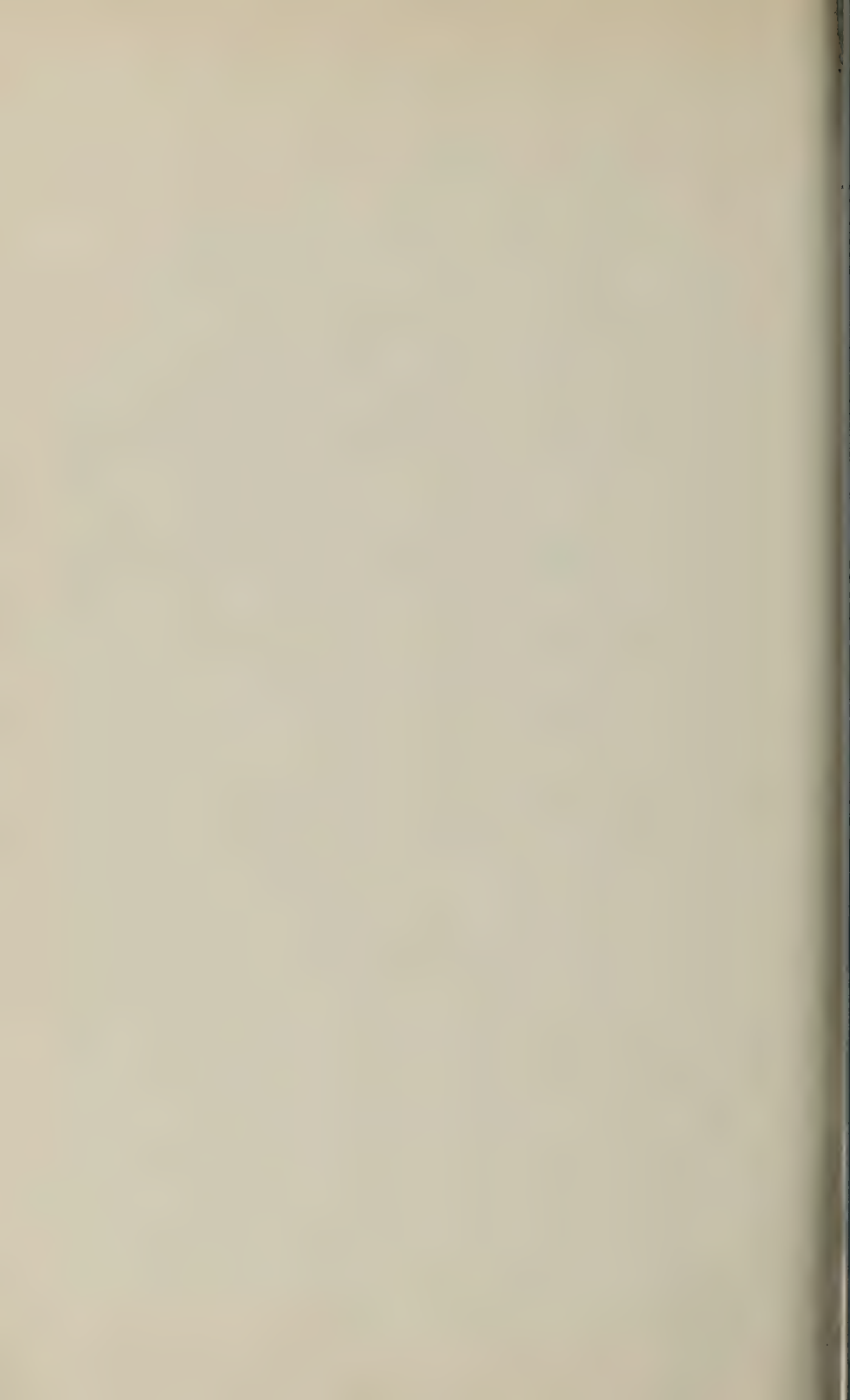
The objections to the charge now taken are really verbal criticisms or objections as to the Court's action in failing to give fuller instructions upon some points as to which plaintiff in error failed to request anything further. It is eminently a case for the application of the salutary rule declared in the Allis case.

In conclusion we submit that the plaintiff in error was proven to be guilty of a violation of the law, and that his rights were not violated in any respect, and that the judgment of the Court should be affirmed.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERDIAN,
*Asst. United States Attorney, Attorneys
for Defendant in Error.*



No. 3955

United States
Circuit Court of Appeals

For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING.

R. PLATNAUER,

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Sacramento, Cal.,

Attorney for Plaintiff in Error.

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

G. TRAVERSI,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

*To the Honorable the United States Circuit Court
of Appeals for the Ninth Circuit.*

Plaintiff in error respectfully petitions this honorable court to vacate the decision heretofore rendered and to grant him a re-hearing herein.

As stated by this court the evidence of the defendant's guilt of the offense charged in the first count of the information was "meagre," and the question whether or not plaintiff in error was bringing in the wine in question for his luncheon was one for the *jury* to determine.

This being so, then, certainly, plaintiff in error was at least entitled to his constitutional right to have the jury pass upon *all* the evidence that might

throw any light upon the subject; but here, *that* right was, by the instructions of the trial court, *taken from him*.

The portion of the instructions which plaintiff in error submits has this effect (Tr. p. 35) reads as follows:

“It is true, as the United States Attorney suggests, that it is not necessary under this Act that it be shown that any positive sale or dispensation of liquor was going on at the time, provided it is shown that there was liquor maintained on the premises. Section 33 of the Act provides ‘After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of, in violation of the provisions of this title.’ In other words, where liquor is found upon premises that are not of the character of those described in the Act as being such that people are entitled to keep liquor there, then that very fact raises the presumption and is *prima facie* evidence that it was there for an illegal purpose under the law. As I say, the only place where liquor is permitted to be maintained under the Prohibitor Act is in one’s private residence, premises devoted solely to the occupation and use

as such. It is true that where one lives at a hotel or lives in a flat, or lives in apartments, exclusively devoted to the purpose of residence, he may keep and maintain liquors in those premises so occupied by him, but he is not at liberty to carry it out of those premises or take it out for the purpose of going somewhere else and enjoy it with his meals. The purpose of the law is to suppress the public consumption and maintenance of liquors that are prohibited under this Act so that the law shall not be subject to any *pretense* that it is being used under such circumstances *solely for the use of the parties*. If the defendant Traversi is testifying *truthfully* that he was taking it with him to some place where he was going to have his lunch he would be *violating the law*, because if he maintained it in his private residence he would be entitled to have it there and serve his family there, but not permitted to take it off those premises."

After informing the jury of the rule of evidence that the illegal possession of intoxicating liquor is *prima facie* evidence that such liquor is kept for the purpose of being sold, etc., the Court, by this instruction, tells them that the purpose of the law is to suppress the public consumption and maintenance of liquor so that the law shall not be subject to any *pretense* that it is being used for a purpose *other*

than that of being sold, bartered, exchanged, given away, furnished or otherwise illegally disposed of, and continues that even though plaintiff in error testified *truthfully* that he intended consuming the wine himself for his lunch, still he would be violating the law, and that, therefore, the jury could not consider *that* fact in arriving at a verdict, because of the *prima facie* rule of evidence, and of the presumption, that intoxicating liquor possessed illegally was kept for the purpose of its being sold, etc. In other words, the jury was thereby instructed that if they should find that plaintiff in error was in the possession of the liquor at a place prohibited under the law, then it was their duty to convict him of the offense of keeping said liquor at such place for sale, notwithstanding they might believe that he had no intention of selling it, but that his only purpose of having it was to drink it himself; thus taking *from* the jury a question which this court says "was clearly" for that body.

Plaintiff in error further respectfully submits that the record shows that *this* instruction was not one of those, as stated by this court, "with which the parties were satisfied at the time they were given." The answer "no," given by the attorney for plaintiff in error to the question of the court: "Is there anything else that counsel would like to ask?" was so given prior to the time that the court gave the instruction complained of, and referred

solely to those instructions that had theretofore been given. (See Transcript p. 35.)

Surely, therefore, an injustice *has* been done to plaintiff in error, if the jury *was* instructed that they could not consider the testimony of plaintiff in error that he intended consuming the liquor with his lunch, in arriving at a verdict.

The following instruction was also given *subsequent* to the time that plaintiff in error, by his attorney, in answer to the court's question, stated that he did not desire to ask anything else, (See p. 37 transcript). "You are entitled to draw reasonable deduction from the evidence that is before you and determine whether if liquor was brought there at one time in an illegal way, it was not brought there *for the same purpose* on *other* occasions. It is a *question of fact* for you."

As there was absolutely *no* evidence that any intoxicating liquor had *ever* been brought to the premises at any other time, or that on any *other* occasion any intoxicating liquor had been on such premises, the jury, by this instruction, was informed that they might consider a fact *not in evidence*.

There *could* be no greater injustice done to a defendant in a criminal action than to permit a jury to take into consideration any fact or circumstance *not in evidence*, and regarding which no testimony whatever had been introduced.

It is intimated by the concurring opinion of the distinguished Circuit Judge that this court should

refuse to consider the evidence because no exceptions had been taken. Plaintiff in error respectfully submits that a refusal to do so in the case at bar would, to use the language of this court in *Bilboa v. United States*, "operate as a miscarriage of justice" and would amount to "a judicial wrong," and that a *consideration*, at least, of the evidence and of the instructions is not only proper, but necessary, for the purpose of enabling this court to *determine* whether or not such miscarriage of justice has occurred or such judicial wrong exists.

Respectfully submitted,

R. PLATNAUER,

Attorney for Plaintiff in Error.

I, R. Platnauer, the attorney for the Plaintiff in Error in the above entitled action, do hereby certify that, in my opinion, the foregoing petition for a rehearing is well founded, and I do further certify that said petition is not interposed for delay.

(R. Platnauer)

Attorney for Plaintiff in Error.

